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Supreme Court of the United States

UTILITY SOLID WASTE ACTIVITIES GROUP,
ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY,
AMERICAN ELECTRIC POWER SERVICE CORPORATION,
AND GENERAL ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the second prong of the ripeness test set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) – hardship to the parties – must be satisfied even where the issue presented is purely legal, and Congress has prescribed an immediate, limited period for judicial review.

2. Whether the court of appeals erred when it declined to apply the "substantial evidence" standard of judicial review mandated by 15 U.S.C. § 2618(c)(1)(B)(i) to an agency rule because the court believed that the nature of the petitioner's challenge merited the imposition of a different, more deferential standard of review.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioners state that the parties to the proceedings below were Central and South West Services, Inc.,[1] Entergy Services, Inc., Mississippi Power Company, the Utility Solid Waste Activities Group, General Electric Company, Sierra Club, and the United States Environmental Protection Agency.

Pursuant to Supreme Court Rule 29.6, Petitioner the Utility Solid Waste Activities Group states that it is an ad hoc consortium of approximately 100 electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association and the American Public Power Association. The Utility Solid Waste Activities Group states that it has no stock in the hands of the public and no parent corporation. Petitioner Entergy Services, Inc. states that its corporate parent is Entergy Corporation, which owns all the common stock of Entergy Services, Inc. Petitioner Mississippi Power Company states that its corporate parent is Southern Company, which owns all the common stock of Mississippi Power Company. Petitioner American Electric Power Service Corporation states that its corporate parent is American Electric Power Company, Inc., which owns all of the common stock of American Electric Power Service Corporation. Petitioner General Electric Company states that it has no parent company and that no publicly held company owns ten percent or more of its stock.

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[1] On January 1, 2001, Central and South West Services, Inc. ceased to exist as a corporation and merged into American Electric Power Service Corporation. American Electric Power Service Corporation, as the successor in interest of Central and South West Services, Inc., is therefore named in this petition in lieu of Central and South West Services, Inc.

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JOINT PETITION FOR A WRIT OF CERTIORARI

Petitioners the Utility Solid Waste Activities Group, Entergy Services, Inc., Mississippi Power Company, American Electric Power Service Corporation (collectively "USWAG"), and the General Electric Company ("GE") respectfully jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on August 15, 2000, revised on November 13, 2000, reported at 220 F.3d 683 (5th Cir. 2000), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-35a.

JURISDICTION

The court of appeals entered its decision on August 15, 2000. The petitioners filed a Joint Petition for Rehearing En Banc, and USWAG filed a separate petition for panel rehearing, both of which were denied on November 2, 2000. Pet. App. 36a-37a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The first question presented raises no constitutional or statutory provisions. Instead, it involves the application of a prudential element of the ripeness doctrine announced in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

The second question presented concerns Section 19 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2618, which is reproduced in Pet. App. at 42a-46a. Sections 6(e) and 18 of TSCA, 15 U.S.C. §§ 2605(e) & 2617, are also relevant, and are reproduced in Pet. App. at 38a-42a.

STATEMENT OF THE CASE

The first important question raised by the decision below is whether the second prong of the prudential ripeness test first announced in *Abbott Laboratories* – hardship to the parties from delaying judicial review – must be mechanically applied in all cases. The courts of appeals are split on the question of whether hardship must be considered where, as here, the issue to be reviewed is purely legal, and where, as is also true here, Congress has, by specifying a limited time for judicial review of a regulation after promulgation, expressed its preference for the immediate resolution of disputed issues. This question has far-reaching implications, given the multiplicity of statutes (including many post-*Abbott Laboratories* public health and welfare enactments) that *mandate* that suits seeking judicial review of new administrative rules be brought within a brief period following their promulgation.

The second important question arises because TSCA requires that certain rules promulgated by the U.S. Environmental Protection Agency ("EPA") (including those challenged by the petitioners below) "*shall* be held unlawful" where "not supported by *substantial evidence* in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i) ("TSCA § 19(c)(1)(B)(i)") (emphasis added). The question raised by the decision below is whether a court may override this congressionally-mandated standard of review provision where the reviewing court determines in its discretion that the standard is too demanding. Contrary to every other court that has applied this provision, the Fifth Circuit concluded that the nature of the challenge before it did not justify the heightened scrutiny afforded by the substantial evidence test. The court ignored the clear language of TSCA, and substituted the more deferential arbitrary and capricious test set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), in upholding the challenged rules.

1. Factual Background

The petitions for review below arose from EPA's promulgation of a final rule concerning the use and disposal of polychlorinated biphenyls ("PCBs"), 63 Fed. Reg. 35,384 (June 29, 1998), known as the PCB "Mega Rule." PCBs are a class of compounds originally prized both because they were good insulators and non-flammable. PCBs were manufactured and widely used in many industrial sectors from the 1930s through the 1970s. By 1978, however, Congress prohibited PCB manufacturing, and severely curtailed approved uses. See 15 U.S.C. § 2605(e) ("TSCA § 6(e)"). These statutory provisions, and the resulting regulatory program, have decreased human and environmental exposure to PCBs. Owing to their many historic applications, however, PCBs are still found in the environment and in industrial settings, including in equipment that still is being used for its original purpose (*e.g.*, electrical transformers).

The PCB Mega Rule was the culmination of a seven-year effort by EPA to reform its PCB program, which, over the prior 20 years, had become a tangled mass of restrictions, conditions, use authorizations, and cleanup and disposal requirements. In the Mega Rule, EPA attempted to add flexibility to, or streamline, its PCB decontamination, cleanup, and disposal procedures, and to clarify and codify other policies and practices that had developed over time but were not part of the regulations.

In the court of appeals,[2] petitioner USWAG challenged EPA's assertion in the Mega Rule that state and local PCB disposal regulations are not preempted by TSCA. EPA took this position both in the legally binding preamble to the Mega Rule, 63 Fed. Reg. at 35,386, and in its substantive text, 40 C.F.R. §§ 761.50(a)(6), 761.72(c)(2), & 761.79(a)(6). As required, USWAG's suit was filed "[n]ot later than 60 days after the date of the promulgation of" the Mega Rule. 15 U.S.C. § 2618(a)(1)(A) ("TSCA § 19(a)(1)(A)").

The basis for USWAG's claim of express federal preemption was 15 U.S.C. § 2617(a)(2)(B) ("TSCA § 18(a)(2)(B)"), which provides that, with limited exceptions, "no State or political subdivision of a State may, after the effective date of [*inter alia*, a TSCA § 6(e) PCB] requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture." The Fifth Circuit had previously interpreted this TSCA provision. It held that a local ordinance banning the disposal of PCBs was expressly preempted by 15 U.S.C. § 2617 ("TSCA § 18"), reasoning that "Congress has *explicitly* mandated that [TSCA], and regulations promulgated under it by the EPA, preempt state and local

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[2] Jurisdiction over petitions to review PCB regulations is initially in the courts of appeals. *See* 15 U.S.C. § 2618(a)(1)(A) ("TSCA § 19(a)(1)(A)"). USWAG and GE filed separate petitions for review which were ultimately consolidated before the Fifth Circuit.

regulation of PCB disposal." *Rollins Envtl. Servs.* v. *Parish of St. James*, 775 F.2d 627, 634 (5th Cir. 1985).

In addition, both USWAG and petitioner GE challenged a variety of other provisions in the Mega Rule, including the scientific underpinnings for the PCB cleanup and decontamination provisions, the storage for reuse rule, certain provisions governing PCB transformers, and the authorization to use PCB-contaminated buildings and other surfaces. Central to each challenge was the assertion that EPA's action was unsupported by substantial evidence (indeed in some cases, any evidence) in the administrative record. TSCA § 19(c)(1)(B)(i) expressly provides that "in the case of a rule under [TSCA § 6(e)], . . . the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i). Both USWAG and GE noted that several courts had applied the substantial evidence standard to their review of PCB rules, including the Fifth Circuit previously in *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991), and the District of Columbia Circuit in *Environmental Defense Fund, Inc.* v. *EPA*, 636 F.2d 1267 (D.C. Cir. 1980). Besides being statutorily mandated, the parties observed that TSCA's substantial evidence test is more searching than the APA's arbitrary and capricious standard. See, *e.g.*, *Corrosion Proof Fittings*, 947 F.2d at 1213-14.

2. Decision of the Court of Appeals

The Fifth Circuit dismissed in substantial part GE's and USWAG's review petitions.[3] In doing so, it made two

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[3] EPA agreed to, and the Fifth Circuit therefore ordered, a remand of the cleanup and decontamination provisions of the Mega Rule (40 C.F.R. §§ 761.61(a) & 761.79(b)) in response to petitioners' arguments that EPA's estimate of the toxicity of PCBs was not supported by substantial evidence in the record. Pet. App. 22a, 35a. On remand, EPA is reviewing

remarkable holdings: First, it ruled that USWAG's preemption claim was not ripe for review, even though it involved a pure question of law, and was filed during the statutorily-prescribed period for judicial review; second, it ruled that TSCA's "substantial evidence on the record" standard for review of the regulation should be discarded in favor of the more deferential arbitrary and capricious standard.

1. On ripeness, the Fifth Circuit panel observed that *Abbott Laboratories* was the source of the ripeness requirement in proceedings for judicial review of administrative action:

> The Supreme Court has explained that the essence of the ripeness doctrine is to: "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

Pet. App. 10a-11a (citing *Abbott Labs.*, 387 U.S. at 148-49).

While agreeing that, where a challenge is purely legal, prudential concerns that typically lead courts to reject facial challenges to agency regulations become less important, the Fifth Circuit nonetheless concluded that "where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." Pet App. 11a. In light of this requirement, the court held that USWAG's preemption challenge was unripe, claiming that USWAG did not identify the state or local regulations that it contended

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that estimate. The Fifth Circuit also remanded another section (40 C.F.R. § 761.35) since EPA had not adequately explained why it had not granted a variance requested by the electric utility industry. *Id.* at 16a, 35a.

TSCA should preempt, nor offer evidence that it would suffer hardship if the court deferred consideration of the issue.[4] The court thus concluded that "any hardship that USWAG could suffer is conjectural." *Id.* at 12a. The panel made no mention of TSCA's 60-day limitation on post-promulgation judicial review, nor of the District of Columbia Circuit's line of decisions holding that predominantly legal challenges brought within statutorily-mandated periods for judicial review need not meet the "hardship to the parties" test. See, *e.g.*, *Louisiana Envtl. Action Network* v. *EPA*, 172 F.3d 65 (D.C. Cir. 1999).

2. In laying out the standard for its review of the petitioners' remaining claims, the Fifth Circuit initially recognized that for TSCA § 6(e) rules (*i.e.*, PCB rules) "'the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole.'" Pet. App. 5a (quoting TSCA § 19(c)(1)(B)(i)). It further recognized that "'Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize [EPA's] actions more closely than an arbitrary and capricious standard would allow.'" *Id.* (alteration in original) (quoting *Corrosion Proof Fittings*, 947 F.2d at 1214).

Nevertheless, the Fifth Circuit found that when it considered TSCA § 19(c)(1)(B)(i) in "context," that section did not "require" application of the mandated substantial evidence standard to the petitioners' claims. Pet. App. 6a-7a. The "context" consisted primarily of the following two findings:

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[4] As explained in its petition for panel rehearing, USWAG in fact cited to PCB disposal regulations from five states that it contended TSCA should preempt. USWAG also explained how these more stringent state regulations would frustrate and hamper PCB cleanups by USWAG members across the country, and why immediate resolution of this issue was necessary to prevent harm to petitioners. *See* Pet. App. 61a-63a & n.11.

(1) that TSCA § 6(e) "establishes a categorical ban on most uses of PCBs except as authorized by EPA," *id.* at 6a-7a, which the court characterized as a "rebuttable presumption that all uses of PCBs present an unreasonable risk of injury to health and the environment," *id.* at 7a; and (2) that the petitioners' challenges to the Mega Rule were in essence claims that EPA failed "to act," or "to craft as large an exemption as petitioners would like." *Id.* From these conclusions, the court reasoned that the petitioners were not entitled to any greater standard than would apply to most informal rulemakings, *i.e.*, that the agency acted arbitrarily and capriciously, because "[t]o require a greater evidentiary showing by EPA would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes." *Id.*

After acknowledging but distinguishing the District of Columbia Circuit's straightforward application of TSCA § 19(c)(1)(B)(i) in an earlier challenge to EPA's § 6(e) PCB regulations, see *Environmental Defense Fund*, 636 F.2d at 1277-78, the Fifth Circuit concluded:

> Accordingly, we hold that the substantial evidence standard of review provided for under section 19(c)(1)(B)(i) applies only when a petitioner challenges EPA's decision to depart from the outright ban and permit the use or expand the use of PCBs. *When a petitioner challenges an EPA rule restricting or prohibiting the use of PCBs, courts must review EPA's action under the arbitrary and capricious standard of review.*

Pet. App. 8a. (emphasis added)

REASONS FOR GRANTING THE PETITION

This case presents an important, recurring issue of federal ripeness jurisprudence. The Court's original prudential ripeness paradigm, announced in a trilogy of cases including *Abbott Laboratories*, states that ripeness turns on "the fitness

of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. In reliance on this test, the Fifth Circuit dismissed USWAG's preemption challenge, even though the Mega Rule was final agency action, the issue was purely legal, and the suit was filed within the limited 60-day period for judicial review specified in TSCA, because there was no evidence that hardship would ensue from delaying review. This approach conflicts with that taken by the District of Columbia Circuit, which has held that no showing of hardship is necessary when a challenge to final agency action presents predominantly legal issues, and the suit was filed within a statutorily-limited period for review. See, *e.g.*, *Eagle-Picher Indus.* v. *EPA*, 759 F.2d 905, 915-19 (D.C. Cir. 1985).

The *Abbott Laboratories* Court neither considered nor predicted Congress's increasing practice of specifying limited, immediate periods for preimplementation judicial review of new rules or regulations. The evolution of Congress's approach to administrative law necessitates a shift in the proper treatment of ripeness. This Court should grant certiorari in order to resolve the split between the courts of appeals on this prominent, oft-repeating issue.

This case also presents a significant question of statutory construction. TSCA § 19(c)(1)(B)(i) provides that courts must invalidate regulations issued under certain provisions of TSCA if they are "not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i). By this provision, Congress displaced the arbitrary and capricious standard of review ordinarily prescribed for agency rulemaking under the APA, 5 U.S.C. § 706(2)(A). Contrary to other courts of appeals that have applied the TSCA judicial review provision, the Fifth Circuit, without any basis in the statutory language, rejected the express language of that section. Instead, the court held that the substantial evidence standard was applicable only to petitions challenging a regulation departing from the TSCA

§ 6(e) ban on the use of PCBs, while the arbitrary and capricious standard was applicable to petitions challenging regulations that restrict or prohibit the use of PCBs.

The Fifth Circuit's conclusion is contrary to the plain language of the statute and the views of other courts of appeals that have considered TSCA § 19(c)(1)(B)(i) and similar judicial review provisions in other statutes. By conditioning the applicable standard of review upon the nature of the petitioner's claim, the decision also creates an unworkable framework for determining what standard of review to apply. This Court should grant certiorari in order to clarify the proper standard of review under TSCA § 19(c)(1)(B)(i) and similar provisions of other statutes.

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS CONCERNING THE APPLICABILITY OF THE "HARDSHIP" PRONG OF THE *ABBOTT LABORATORIES* RIPENESS TEST WHERE THE ISSUE TO BE REVIEWED IS PURELY LEGAL AND THE TIME FOR REVIEW OF REGULATIONS IS LIMITED BY STATUTE.

A broad array of major federal statutes provide immediate but limited periods for preimplementation judicial review of new agency regulations. See, *e.g.*, the Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A); the Securities Exchange Act, 15 U.S.C. § 78y(b)(1); the Consumer Products Safety Act, 15 U.S.C. § 2060(a); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976(a)(1); the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1); the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9613(a); and TSCA; see also Pet. App. 47a-59a (quoting the above and other statutory provisions that provide limited judicial review periods for new rules). These include many hallmark health and welfare programs enacted since this Court decided *Abbott Laboratories*. Regulations promulgated

pursuant to these statutes occupy many volumes of the Code of Federal Regulations.

By specifying limited, up-front periods for review, Congress has expressed a strong preference for scrutinizing new rules prior to implementation so that unreasonable or unsupportable elements can be excised before the government and the regulated community devote resources to implementation and compliance. The relationship of such provisions to the "hardship" prong of the *Abbott Laboratories* ripeness test is an important, recurring issue, which, until the Fifth Circuit's decision below, had been resolved in favor of allowing challenges to proceed within those congressionally prescribed periods.

A. Recognizing the prudential nature of the "hardship" test, the District of Columbia Circuit has dispensed with it in many cases where the issues are predominantly legal, and the time for judicial review is circumscribed by statute. The issue first arose in *Eagle-Picher*, where the court was presented with a challenge to CERCLA regulations filed within the 90-day review period prescribed in 42 U.S.C. § 9613(a). See Pet. App. 59a. The court rejected EPA's ripeness defense to the petition, stating:

> It is abundantly clear from the plain language of [§ 9613(a)] that Congress intended to provide prompt, uniform "pre-enforcement" review of CERCLA regulations to a broad class of petitioners, in order to avoid needless delays in the implementation of an important national program. This provision constitutes compelling evidence that Congress has, in effect, decided that the interest of the EPA in effectuating CERCLA's purposes will generally be furthered by review during the statutory period and, by implication, hindered by postponing review. . . . In determining a regulation's ripeness for review, courts should accord heavy weight to this sort of strong congressional proclamation of an agency's interest in the timing of review of its regulations.

759 F.2d at 916 (footnote omitted). The District of Columbia Circuit accordingly concluded that "no purpose is served by proceeding to the second prong" of the *Abbott Laboratories* ripeness test. *Id.* at 918. Stated otherwise, Congress's directive that courts hear challenges to new rules immediately renders inapposite the *Abbott Laboratories* Court's prudential interest in "protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." 387 U.S. at 148.

The District of Columbia Circuit has followed this approach in petitions for review filed under several different statutory schemes, each of which provides a window for preimplementation judicial review. See *Louisiana Envtl. Action Network*, 172 F.3d at 69 (RCRA); *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622 (D.C. Cir. 1998) (CAA); *Natural Res. Def. Council, Inc.* v. *EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (CAA); *National Recycling Coalition, Inc.* v. *Reilly*, 884 F.2d 1431, 1434 (D.C. Cir. 1989) (RCRA). Indeed, the *National Recycling Coalition* court took the *Eagle-Picher* analysis one step further, holding that judicial review during the limited period set forth in RCRA was "not merely 'preferred,' it was statutorily required." 884 F.2d at 1434.

TSCA § 19(a)(1)(A)'s 60-day limitation on judicial review is, in substance, the same as the limitation provisions central to the District of Columbia Circuit's ripeness analysis in the above cases.[5] In each, Congress set forth immediate but

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[5] *Compare* TSCA § 19(a)(1)(A) ("Not later than 60 days after the date of the promulgation of a rule under [various sections of TSCA including § 6(e)], any person may file a petition for review of such rule" with the appropriate court of appeals), *with, e.g.*, 42 U.S.C. § 6976(a)(1) ("a petition for review of action of the Administrator in promulgating any regulation . . . shall be filed within ninety days from the date of such promulgation") (at issue in *Louisiana Envtl. Action Network*), *and id.* § 7607(b)(1) ("A petition for review of [various agency actions and

limited periods in which challenges to new regulations may be brought, and specified the court or courts in which such challenges must be filed. These periods are substantially similar to statutes of limitations, and have been held to be jurisdictional. See, *e.g.*, *Edison Elec. Inst.* v. *EPA*, 996 F.2d 326, 331-32 (D.C. Cir. 1993) (holding untimely a challenge to RCRA regulations not filed within 90 days of promulgation).

B. Neither *Abbott Laboratories* nor its companion cases on administrative ripeness, *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), involved regulations for which Congress had specified a period for preimplementation review.[6] Nevertheless, while the Court has not squarely addressed the ripeness issue presented here in any previous case, the Court has strongly suggested in two recent decisions that where Congress specifies a period for preimplementation judicial review, the hardship prong of the *Abbott Laboratories* test should not apply. First, in *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726 (1998), the Court held unripe a challenge to a U.S. Forest Service management plan for a national forest in Ohio. In conducting the ripeness

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regulations] . . . shall be filed within sixty days from the date notice of such promulgation. . . .") (at issue in *Natural Res. Def. Council*), *and id.* § 9613(a) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations.") (at issue in *Eagle-Picher*) (the text of each provision is reproduced in Pet. App. 57a-59a).

[6] The Federal Food, Drug and Cosmetic Act, at issue in all three cases, does provide for the immediate review of some types of regulations. *See* Pet. App. 50a-51a. The Court rejected the argument that by specifically enumerating certain rules for preenforcement review, Congress intended to bar preenforcement review of others. *See Abbott Labs.*, 387 U.S. at 141-48. The Court, however, did not consider the significance of the immediate review provisions to its ripeness analysis.

analysis, the Court emphasized that "Congress has not provided for preimplementation judicial review of forest plans. . . . The Plan is consequently unlike agency rules that Congress has specifically instructed the courts to review 'preenforcement.'" *Id.* at 737. Notably, in support of this holding, the Court cited 15 U.S.C. § 2618 ("TSCA § 19") as an example of a congressional requirement for courts to hear preenforcement challenges. See *id.*

In a second case decided just last term, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), the Court made general reference to the doctrines of ripeness and exhaustion of administrative remedies in the course of its jurisdictional analysis of a suit challenging certain Medicare regulations. Specifically, it noted that the:

> [d]octrines of "ripeness" and "exhaustion" contain exceptions, however, which exceptions permit early review when, for example, the legal question is "fit" for resolution and delay means hardship, or when exhaustion would prove "futile." (*And sometimes Congress expressly authorizes pre-enforcement review, though not here. See, e.g., 15 U.S.C. § 2618(a)(1)(A) (Toxic Substances Control Act).*)

Id. at 13 (emphasis added) (citations omitted). Having used TSCA § 19 twice to distinguish potentially ripe from unripe actions, the Court should grant certiorari, and decide whether TSCA's limitation on judicial review in fact renders the traditional "hardship" test unnecessary and contrary to congressional intent.

C. Here, the preemption issue is predominantly, if not purely, legal in nature, see *Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 201 (1983) (finding preemption to be a predominantly legal issue fit for review), and the Mega Rule is undoubtedly final agency action under the APA. See 63 Fed. Reg. at 35,384 (noting that the Mega Rule is a "Final

rule").[7] These factors render the issue "fit" for review. *Abbott Labs.*, 387 U.S. at 149-51. Under the District of Columbia Circuit's formulation in *Eagle-Picher*, fitness for review, taken together with Congress's express preference for early review of TSCA regulations, leads to the conclusion that the TSCA § 18 preemption issue is fully ripe for consideration.

The Fifth Circuit, however, relied solely on the traditional ripeness analysis, including hardship to the parties, in ruling against USWAG. See Pet. App. 1a (citing *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998); *Chevron U.S.A., Inc.* v. *Traillour Oil Co.*, 987 F.2d 1138 (5th Cir. 1993); *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 833 F.2d 583 (5th Cir. 1987)). None of the cases cited by the court involved a limited judicial review period.

Furthermore, under the panel's approach, some petitioners may be denied facial review of new rules altogether in instances where their claims are deemed unripe during the limited review period, and then deemed time-barred later. Given that time limits on preimplementation judicial review are likely jurisdictional, see *Edison Elec. Inst.*, 996 F.2d at 331-32, a petitioner whose claim is held unripe during the specified review period, but who suffers what the Fifth Circuit finds is "hardship" later (due, for example, to pressure to comply with the new regime or face enforcement, a hardship recognized in *Abbott Laboratories*), would likely be foreclosed from reinstituting its suit at that time.[8] This is

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[7] The Fifth Circuit expressly acknowledged that EPA's legally binding preamble text regarding preemption was a final regulation for purposes of judicial review. Pet. App. 10a n.2 (citing *Chemical Waste Mgmt.* v. *EPA*, 869 F.2d 1526, 1533 (D.C. Cir. 1989)).

[8] The result is even more extreme where limited periods of preimplementation judicial review also have been held to preclude as-applied

particularly true here, where states and localities, emboldened by the Mega Rule's regulatory reversal of TSCA § 18's preemption provision, will increasingly require strict compliance with their PCB rules and regulations that are inconsistent with, and more stringent than, the federal PCB rules. Even if TSCA § 18 may be raised as a defense to an individual state or local prosecution of such rules and regulations, the regulated community will never be able to obtain declaratory relief invalidating EPA's regulatory misinterpretation of TSCA § 18 in the Mega Rule, because such a suit would likely be time-barred by TSCA § 19(a)(1)(A).[9]

The Court should grant certiorari to resolve the conflict in the courts of appeals concerning the proper scope of the ripeness test where Congress has established a limited period for the immediate judicial review of new agency pronouncements. In light of the statutes that provide for preimplementation review of new rules, and the multiplicity of regulations that are continually promulgated pursuant to these statutes, this issue is recurring, important, and deserving of resolution now.

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challenges during enforcement actions. *See, e.g.*, 33 U.S.C. § 1369(b)(2); 42 U.S.C. § 9613(a); *Natural Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 167 (D.C. Cir. 1988); *Eagle-Picher*, 759 F.2d at 916. In those cases a petitioner may be precluded from raising *either* facial or as-applied challenges to the rule at issue.

[9] As USWAG argued below, such a scenario would require resolution of the TSCA preemption issue on a state-by-state, case-by-case basis, which would impose tremendous burdens on petitioners, and needlessly tax judicial resources nationwide. Pet. App. 61a-63a.

II. THE FIFTH CIRCUIT ERRED WHEN, CONTRARY TO OTHER COURTS OF APPEALS, IT DECLINED TO APPLY TSCA'S EXPRESS SUBSTANTIAL EVIDENCE STANDARD OF REVIEW TO CHALLENGES TO EPA'S PCB MEGA RULE.

A. In TSCA and several other statutes that authorize agency rulemaking, Congress has expressly displaced the arbitrary and capricious standard of review ordinarily applicable under the APA (see 5 U.S.C. § 706(2)(A)) with the requirement that the agency justify its rules by substantial evidence. TSCA § 19(c)(1)(B)(i) provides that, for review of regulations issued under the authority granted by certain sections of the statute, including § 6(e), "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i).

Despite the unequivocal language of this provision, the Fifth Circuit concluded that when a petitioner challenges an EPA decision *not* to permit PCB use under TSCA § 6(e), or challenges a use permitted under TSCA § 6(e) as too restrictive, the rule will be subject to the less exacting arbitrary and capricious standard of review. The court did so notwithstanding the absence of any language in TSCA §19(c)(1)(B)(i) providing for an arbitrary and capricious standard. The court of appeals' rejection of the unambiguous judicial review provision of TSCA § 19(c)(1)(B)(i), and its decision to nevertheless review some rules, in some circumstances, under an arbitrary and capricious standard, puts it at odds with the other courts of appeals that have considered this TSCA provision and similar provisions of other statutes.

1. The decision below is inconsistent with decisions of other courts of appeals applying the identical provision of TSCA. The District of Columbia Circuit held that the "more rigorous" substantial evidence standard "expressly set forth in" TSCA § 19(c)(1)(B)(i) applied to EPA regulations creating exceptions to the ban on PCB use under TSCA § 6(e).

Environmental Def. Fund, 636 F.2d at 1277-78 (reviewing EPA rules that, *inter alia*, permitted routine servicing of certain PCB-containing transformers and electromagnets). That court later amplified its understanding that Congress intended TSCA § 19(c)(1)(B)(i) to require a searching review of the agency's reasons and explanations for rules promulgated under § 6(e). See *Chemical Mfrs. Ass'n* v. *EPA*, 859 F.2d 977, 991-92 (D.C. Cir. 1988); see also *Ausimont U.S.A. Inc.* v. *EPA*, 838 F.2d 93, 95-96 (3d Cir. 1988) (applying the substantial evidence standard to review EPA fluoroalkene regulations issued under TSCA).

The distinction between the uniform substantial evidence standard of review mandated by Congress and the variable approach applied below is an important one. Several courts of appeals have noted that TSCA § 19(c)(1)(B)(i) imposes a more searching standard of review than would ordinarily be applied under the APA.[10] The legislative history of TSCA § 19(c)(1)(B)(i) makes clear that Congress intended that courts "focus on the rulemaking record to see if the Administrator's action is supported by that record," and for that reason declined to provide for the traditional "arbitrary and capricious" review. H.R. Conf. Rep. 94-1679, at 96 (1976). More generally, several courts of appeals have described the substantial evidence test as requiring closer, more rigorous, and more demanding scrutiny of an agency's regulation than the relatively deferential arbitrary and capricious test normally applied to rulemaking under the APA.[11] This Court has

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[10] *See Chemical Mfrs. Ass'n*, 859 F2d. at 991-92; *Ausimont U.S.A.*, 838 F.2d at 96; *Shell Chem. Co.* v. *EPA*, 826 F.2d 295, 297 (5th Cir. 1987); *Environmental Def. Fund*, 636 F.2d at 1277.

[11] *See Florida Mfd. Hous. Ass'n, Inc.* v. *Cisneros*, 53 F.3d 1565, 1573 (11th Cir. 1995); *Asbestos Info. Ass'n/N. Am.* v. *OSHA*, 727 F.2d 415, 421 (5th Cir. 1984) *AFL-CIO* v. *Marshall*, 617 F.2d 636, 649 (D.C. Cir. 1979), *aff'd in part, vacated in part sub nom. American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490 (1981); *Union Oil Co.* v. *Federal Power*

noted that Congress may provide for "considerably more generous judicial review" by requiring courts to apply a substantial evidence test based on a thorough consideration of an entire administrative record, rather than the less searching arbitrary and capricious test. *Abbott Labs.*, 387 U.S. at 143.

It is likely that the rules petitioners challenged would not have survived substantial evidence review under TSCA § 19(c)(1)(B)(i). The substantial evidence standard requires a court to ask "whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (quoting *Consolidated Edison Co.* v. *National Labor Relations Bd.*, 305 U.S. 197, 229 (1938)). The evidence in the record must be "more than a mere scintilla." *Consolidated Edison v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938); see *Chemical Mfrs. Ass'n*, 859 F.2d at 992; *Environmental Def. Fund*, 636 F.2d at 1277-78 & n.27. The court below upheld several Mega Rule provisions despite a complete lack of record evidence supporting them. For example, the court let stand a rule that reclassified painted metal surfaces as "porous," and required complete removal of PCB-contaminated paint, because "there is no evidence in the record that suggests that paint is not porous to spills of liquid PCBs and EPA provides a sensible explanation for the rule change." Pet. App. 24a. Instead of requiring EPA to produce substantial record evidence to support the regulations on painted surfaces, the court effectively required petitioners to produce substantial evidence that EPA erred. Similarly, the court let

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Comm'n, 542 F.2d 1036, 1041 (9th Cir. 1976); *but see Association of Data Processing Serv. Orgs.* v. *Board of Governors*, 745 F.2d 677, 681-86 (D.C. Cir. 1984) (Scalia, J.) (holding the quantum of factual support required under both standards, as they are stated in the APA, to be the same, although recognizing that Congress may have intended for a more scrutinizing standard where it expressly replaces the APA's arbitrary and capricious standard in a particular statute with the substantial evidence standard).

stand a rule creating a regulatory presumption that small transformers must be regulated as PCB Transformers, not because the rule was supported by substantial evidence, but rather because there was no evidence in the record "that could support the conclusion that the . . . small transformers . . . should not be classified as PCB Transformers." Pet. App. 19a-20a. With no affirmative evidence supporting them, these rules could not survive substantial evidence review.

2. In addition to TSCA, Congress has enacted a number of statutes with provisions specifying a substantial evidence test for review of agency rulemakings.[12] With the solitary exception of the decision below, courts have uniformly abided by the statutory language and applied the substantial evidence test. For example, this Court in *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 522-23 (1981), recognized that the substantial evidence standard applied to review of an agency's regulation based on the plain language of the Occupational Safety and Health Act of 1970 ("OSHA"). See also *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (reviewing OSHA regulation under substantial evidence standard). The courts of appeals, including the Fifth Circuit on other occasions, have also followed the congressional mandate, and reviewed rules under the substantial evidence standard where the statute so provides.[13]

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[12] *See, e.g.*, 15 U.S.C. § 57a(e)(3)(A) (Federal Trade Commission Improvement Act of 1974); 15 U.S.C. § 1193(e)(3) (Flammable Fabrics Act); 15 U.S.C. § 2060(c) (Consumer Product Safety Act); 29 U.S.C. § 655(f) (Occupational Safety and Health Act of 1970).

[13] *See, e.g., Pennsylvania Funeral Dirs. Ass'n* v. *FTC*, 41 F.3d 81, 85 (3d Cir. 1994) (Federal Trade Commission Improvement Act); *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1444 (4th Cir. 1985) (OSHA); *Katherine Gibbs Sch. (Inc.)* v. *FTC*, 612 F.2d 658, 663-64 (2d Cir. 1979) (Federal Trade Commission Improvement Act); *D.D. Bean & Sons Co.* v. *Consumer Product Safety Comm'n*, 574 F.2d 643, 648 (1st

3. The Fifth Circuit erred in deviating from the plain language of TSCA § 19(c)(1)(B)(i). This Court has repeatedly emphasized "that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Interpretation of a statute begins and ends with the statute's language if that language is clear and unambiguous. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 432 (1999); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). TSCA § 19(c)(1)(B)(i) is unambiguous in mandating the form of judicial review: "the court *shall* hold unlawful [*inter alia*, a TSCA § 6(e) rule] if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i) (emphasis added). This provision leaves no room to conclude that two standards of review are applicable to rules promulgated under TSCA § 6(e).

Nor does the legislative history of TSCA suggest any intention on the part of Congress to create a bifurcated standard of review based on the nature of the petitioner's claim. Both the Senate and House versions of the bill called for review of certain rules issued under TSCA pursuant to the substantial evidence standard. See H.R. Conf. Rep. No. 94-1679, at 95. The conference committee report makes clear that the conferees expressly adopted the substantial evidence standard to ensure that a reviewing court focus on the evidence in the rulemaking record. See *id.* at 96. The committee rejected more restrictive language in the original House bill that would have required substantial evidence to support only the "determination or findings required to be made" by the Administrator. See H.R. Rep. No. 94-1341, at 55 (1976). Had Congress intended different standards of review to apply

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Cir. 1978) (Consumer Product Safety Act); *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n*, 569 F.2d 831, 837 (5th Cir. 1978) (same).

depending on the nature of the challenge, it would have so provided, particularly since TSCA itself includes some provisions authorizing rulemakings that are not subject to review under the substantial evidence test. See, *e.g.*, 15 U.S.C. § 2607(a), (c), (d).

B. The Fifth Circuit decision creates a strange and unworkable framework for judicial review of TSCA PCB rules. The decision below permits a petitioner challenging a rule as too permissive to invoke a more exacting standard of review than a party challenging the same rule as too restrictive. Under the Fifth Circuit's formulation, a court must attempt to characterize the nature of both the provision at issue and the challenge before the court can determine which standard of review to apply. Are the conditions themselves being proposed in order to tighten restrictions or loosen restrictions? Was the challenge brought because the rule was perceived as too lax or too stringent? Frequently, if not always, a rule challenge will defy easy categorization. Even where the rule and the challenge can be characterized, which standard applies when one party challenges a rule as too stringent, and another party claims that the rule is too lenient, a situation that is not uncommon in the context of environmental regulations?

In this case the challenged provisions authorized use of PCBs, and thus were "departures" from the statutory ban on using PCBs. Although the court of appeals held that such "departures" should be reviewed under the substantial evidence standard, it nonetheless applied the arbitrary and capricious standard of review. Thus, the court did not even follow its own novel approach when it declined to apply the statutory standard of review to the new use authorization. As the decision below itself demonstrates, the court's approach will sow needless confusion in the administrative and judicial review process.

C. This Court should grant certiorari to resolve this important and recurring issue of statutory interpretation. Highly

contentious rulemakings involving PCBs have been underway for more than two decades, and new rules are still under active consideration. See EPA, Reclassification of PCB and PCB-Contaminated Electrical Equipment (Jan. 16, 2001) (signed by EPA Administrator Browner on January 16, 2001 but not yet published in the Federal Register); 65 Fed. Reg. 18,018 (Apr. 6, 2000) (extending comment period for proposed rule authorized by section 6(e) of TSCA originally published in 59 Fed. Reg. 62,788 (Dec. 6, 1994)). Courts should apply a single, workable standard of review to TSCA regulatory challenges.

Moreover, the decision below creates an unsettling precedent for future review of other agency rulemakings for which Congress has expressly prescribed the standard of review. The Fifth Circuit's interpretation of the TSCA judicial review provision encourages other courts to attempt to divine an overriding purpose or intent of a statute, and to adjust the degree of review afforded an agency's rule according to that purpose, notwithstanding clear statutory language mandating a particular standard of review.

For all the reasons outlined above, the Court should grant the petition to answer these important and recurring questions and resolve existing inconsistencies among the courts of appeals.

CONCLUSION

For the reasons stated, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 31, 2001

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 98-60495, 98-60642 and 98-60804

CENTRAL AND SOUTH WEST SERVICES, INC.; ENTERGY SERVICES INC.; MISSISSIPPI POWER COMPANY; UTILITY SOLID WASTE ACTIVITIES GROUP,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

SIERRA CLUB, A NON-PROFIT CALIFORNIA CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Aug. 15, 2000.

Revised Nov. 13, 2000

Petition for Review of Regulations of the United States Environmental Protection Agency.

Before DAVIS, CYNTHIA HOLCOMB HALL* and SMITH, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's ("EPA") final "Mega Rule" ("Final Rule") concerning the use and disposal of polychlorinated biphenyls ("PCBs"). Petitioners Central and South West Services, Inc., Entergy Services Inc., Mississippi Power Company, Utility Solid Waste Activities Group (collectively "USWAG") and General Electric Co. ("GE") argue that discrete portions of EPA's Final Rule are too restrictive. Petitioner Sierra Club argues that certain provisions of the Final Rule do not sufficiently restrict the use of PCBs. For the reasons that follow, we dismiss, or remand Petitioners's challenges to the Final Rule.

I

Facts and Procedural History

In 1976, Congress enacted the Toxic Substances Control Act ("TSCA"), directing EPA to control the manufacture, processing, distribution, use and disposal of chemical substances and mixtures. 15 U.S.C. § 2601 *et seq.* Congress enacted TSCA "to set in place a comprehensive national scheme to protect humans and the environment from the dangers of toxic substances." *Rollins Environmental Services, Inc. v. St. James Parish*, 775 F.2d 627, 632 (5th Cir.1985). Section 6(e) of TSCA generally phased out the manufacture, processing, commercial distribution and use of a certain class of chemicals known as PCBs. 15 U.S.C. § 2605(e).

PCBs are a class of compounds that were manufactured for a variety of purposes, including cooling and lubricating

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* Circuit Judge of the Ninth Circuit, sitting by designation.

transformers, capacitors and other electrical equipment. PCBs are particularly useful for these purposes because they do not burn easily and are excellent insulators. Monsanto Corp., the U.S. manufacturer of PCBs, produced PCBs between 1930 and 1977. PCBs are also produced as a by-product in the production of various organic chemicals. The most recent EPA study on PCBs states that "PCBs are highly likely to pose a risk of cancer to humans." PCBs: Cancer Dose-Response Assessment and Application to Environmental Mixtures, September 1996, ("1996 Reassessment").

TSCA permits EPA to issue rules authorizing certain uses of PCBs, but only if the agency finds that such use "will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B). Section 6(e) also requires the Administrator to "promulgate rules to . . . prescribe methods for the disposal of [PCBs]." 15 U.S.C. § 2605(e)(1)(A).

Pursuant to these statutory directions, EPA in 1991 initiated rulemaking proceedings on what would become the "PCB Mega Rule." EPA initiated this rulemaking for several reasons. First, EPA's knowledge about the sources, uses, risks, and disposal of PCBs had increased substantially in the years following promulgation of the first disposal regulations. 56 Fed.Reg. at 26,738 (June 10, 1991). Second, the regulated community and the public brought to EPA's attention a number of ways to streamline PCB regulations and to better protect human health and the environment from the risks associated with PCBs. 59 Fed.Reg. at 62,788 (Dec. 6, 1994). Third, fourteen years after the ban on manufacturing, over eight hundred thousand tons of PCBs were still being disposed of each year in the United States. 61 Fed.Reg. at 11,096 (Mar. 18, 1996). EPA was particularly concerned about "large volume PCB wastes" from the shredding of

automobiles, appliances, and the like and also PCB-contaminated soils and sediments. 59 Fed.Reg. at 62,791.

In June 1991, EPA published an Advance Notice of Proposed Rulemaking ("ANPR"), which sought comment on a number of sweeping changes to the PCB regulations. 56 Fed.Reg. at 26,738 (June 10, 1991). After receiving comments on the ANPR, EPA published a Notice of Proposed Rulemaking ("NPRM"), proposing amendments to, among other things, controls on the use and storage of PCB-containing electrical equipment and disposal and cleanup of PCBs. 59 Fed.Reg. at 62,788 (Dec. 6, 1994). EPA received over 200 comments on the NPRM and held a public hearing on the NPRM in June 1995.

In June 1998, approximately three-and-a-half years after the NPRM and seven years after the ANPR, EPA promulgated the final PCB Mega Rule ("Final Rule") (codified at 40 C.F.R. §§ 761.1—.398), adopting significant amendments affecting the use, manufacture, processing, distribution in commerce, and disposal of PCBs. 63 Fed.Reg. at 35,384 (June 29, 1998).

Two sets of petitioners, USWAG and GE, challenge discrete aspects of the Final Rule, arguing essentially that the revisions do not go far enough in relaxing regulatory controls on PCB storage and disposal. In the third petition, Sierra Club argues that the rule goes too far and thus allows unreasonably risky disposal practices. This Court has jurisdiction to review challenges to the Final Rule pursuant to Section 19(a) of TSCA, 15 U.S.C. § 2618(a), which grants interested parties the right to appeal directly a final rule promulgated under section 6(e) to this or any other regional circuit court of appeals. We consider each of the petitioners' arguments in turn.

II

Standard of Review

TSCA states that the Administrative Procedure Act's scope of review provision, 5 U.S.C. § 706, shall apply to review of rules under TSCA section 6(e) except that "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole." TSCA § 19(c)(1)(B)(i); 15 U.S.C. § 2618(c)(1)(B)(i)(emphasis added).

The substantial evidence standard requires reviewing courts "to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.' " *Dickinson v. Zurko*, 527 U.S. 150, 162, 119 S.Ct. 1816, 1823, 144 L.Ed.2d 143 (1999) (citations omitted). "Substantial evidence requires 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213 (5th Cir.1991)(quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)). As this Court emphasized, "Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize [EPA's] actions more closely than an arbitrary and capricious standard would allow." *Id.* at 1214.

Moreover, when EPA seeks to change its regulatory course, it bears the burden of producing evidence in the record supporting the change in its rules. *Center for Science in Public Interest v. Dept. of Treasury*, 797 F.2d 995, 999 (D.C.Cir.1986) (citation omitted)(the agency bears "the burden . . . to justify the change from the status quo. . . ."). And, "[i]t is axiomatic that an agency choosing to alter its

regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.' " *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C.Cir.1987) (citations omitted); *accord Acadian Gas Pipeline Sys. v. F.E.R.C.*, 878 F.2d 865, 870 (5th Cir.1989); *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C.Cir.1983) (agency rescinding rule must "explain why the old regulation is no longer desirable"). "When an agency acts to rescind a standard it previously adopted, a reviewing court will subject that rescission to the same level of scrutiny applicable to the agency's original promulgation." *Association of Public-Safety Comm. Officials-Int'l, Inc. v. F.C.C.*, 76 F.3d 395, 398 (D.C.Cir.1996)(citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

The parties disagree as to how the substantial evidence standard applies to the rulemaking at issue. According to EPA, the unique feature of TSCA § 6(e), which generally prohibits the manufacture or use of PCBs unless EPA has authorized a use, reflects a legislative finding that PCBs pose an unreasonable risk of injury to health. Therefore, EPA argues, TSCA § 6(e) creates a rebuttable presumption that all uses of PCBs present an unreasonable risk of injury to health and the environment. Thus, according to EPA, if a petitioner, such as USWAG or GE, alleges that EPA unreasonably refused to allow a particular use of PCBs, EPA need not show by substantial evidence that petitioners' desired use poses an unreasonable risk to health or the environment. We agree.

When considered in the context of section 6(e), the review provision of TSCA § 19(c)(1)(B)(i) reflects Congress's intent that courts apply the higher substantial evidence standard of review only to those EPA decisions *permitting* the use of PCBs. Section 6(e) establishes a categorical ban on most uses

of PCBs except as authorized by EPA. Although this section permits EPA to craft exceptions to this outright ban, it does not require the agency to do so. Section 19(c)(1)(B)(i), in turn, ensures that when EPA does exercise its discretion to create an exception, it does so only to the extent supported by substantial evidence. Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like. Petitioner may nevertheless challenge such a decision, or indecision as the case may be, but they must do so as most petitioners do in most informal rulemakings, by showing that the agency acted arbitrarily and capriciously. *See* 5 U.S.C. § 706(2)(A). To require a greater evidentiary showing by EPA would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes.

Petitioner, USWAG, contends that the D.C. Circuit in *Environmental Defense Fund, Inc. v. EPA*, ("*EDF*") 636 F.2d 1267 (D.C.Cir.1980), held that TSCA does not create a statutory presumption that the use of PCBs presents an unreasonable risk of injury to health or the environment. Petitioner's reliance on *EDF* is misplaced. In *EDF*, petitioners argued that TSCA prohibited EPA from permitting most uses of PCBs under any circumstance. 636 F.2d at 1275 n. 17. In effect, the petitioner argued that the statute created an unrebuttable presumption that PCBs pose an unreasonable risk to health and the environment and that, therefore, EPA could not authorize the use of PCBs. In rejecting this argument, the D.C. Circuit held that the statute does not create an *unrebuttable* presumption. *Id.* We agree with this conclusion and, as indicated above, we conclude that the statutory language creates a rebuttable presumption that uses of PCBs pose an unreasonable risk to health and the environment.

Accordingly, we hold that the substantial evidence standard of review provided for under section 19(c)(1)(B)(i) applies only when a petitioner challenges EPA's decision to depart from the outright ban and permit the use or expand the use of PCBs. When a petitioner challenges an EPA rule restricting or prohibiting the use of PCBs, courts must review EPA's action under the arbitrary and capricious standard of review.

III

USWAG Petition

USWAG first challenges a provision of the preamble to the Final Rule that states that TSCA does not preempt state or local PCB cleanup, storage, and disposal regulations. USWAG also challenges the portion of EPA's Final Rule that imposes restrictions on the storage for reuse of PCB Articles, as well as the section of the Final Rule that creates a regulatory assumption for classifying "small transformers" as "PCB Transformers."

A

Federal Preemption

Section 18 of TSCA provides, in pertinent part, that:

> [e]xcept as provided in subsection (b) of this section . . .
>
> . . . if the Administrator prescribes a rule or order under section 2604 or 2605 [TSCA § 6] of this title (*other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title*) [referred to as the "Parenthetical Exception"] which is applicable to a chemical substance or mixture, and which is designed to protect the environment associated with such substance or mixture, *no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture* . . . unless such requirement (i) is identical to the requirement prescribed

> by the Administrator, (ii) is adopted under authority of the Clean Air Act or any Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B) (emphasis added).

Thus, once EPA regulates a chemical substance under TSCA § 6, no State or local government may establish or continue to enforce any requirement applicable to such chemical unless: (1) the state requirement fits into one of section 18's three enumerated exceptions, or (2) the state requirement falls within the parenthetical exception to section 18, which exempts rules imposing certain requirements described in TSCA.

USWAG is unhappy with EPA's declaration in the preamble to the Final Rule that "TSCA does not allow the Administrator to preempt State disposal rules which describe the manner or method of disposal of a chemical substance or mixture, or in this instance, the disposal of PCBs." 63 Fed. Reg. at 35,386. USWAG also complains of several provisions of the Final Rule which explain that parties subject to the Final Rule must also comply with other "applicable" Federal, State, and local laws and regulations.[1]

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[1] 40 C.F.R. § 761.50(a)(6) provides that "[a]ny person storing or disposing of PCBs is also responsible for determining and complying with all other applicable Federal, State, and local laws and regulations;" 40 C.F.R. § 761.72(c)(2), that provides "[s]crap metal recovery ovens and smelters disposing of PCBs must provide notification as disposers of PCBs, are not required to submit annual reports, and shall otherwise comply with all applicable provisions of subparts J and K of this part, as well as other applicable Federal, State, and local laws and regulations;" and 40 C.F.R. § 761.79(a)(6), "[a]ny person engaged in decontamination

USWAG argues that the portion of this legally-binding preamble[2] declining to preempt state rules governing the disposal of PCBs contravenes the express intent of Congress to establish a comprehensive and uniform federal PCB regulatory program. Additionally, USWAG argues that the preamble directly conflicts with this Court's controlling precedent in *Rollins*, 775 F.2d at 634 (holding that "Congress has *explicitly* mandated that [TSCA], and regulations promulgated under it by EPA, preempt state and local regulation of PCB disposal.")(emphasis in original). USWAG urges us to vacate EPA's interpretation that TSCA does not preempt state and local regulations regarding the disposal of PCBs.

Before we can reach the merits of USWAG's claims, however, we must consider whether these claims are presently ripe for adjudication. *See Ohio Forestry Ass'n, Inc., v. Sierra Club*, 523 U.S. 726, 731, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998)(case must be ripe in order to be justiciable). The Supreme Court has explained that the essence of the ripeness doctrine is to:

> prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

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under this section is responsible for determining and complying with all other applicable Federal, State, and local laws and regulations."

[2] An EPA declaration contained in the preamble to a final rule setting forth the Agency's final and binding interpretation of the statute qualifies as a reviewable regulation for purposes of judicial review. *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1533 (D.C.Cir.1989) (holding that a regulatory interpretation in preamble to a final rule was ripe for review because EPA had arrived at its ultimate decision on the issue).

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Typically, in the context of rulemaking, "we wait until a rule has been applied before granting review," however, "this prudential concern loses force . . . when the question presented is purely legal." *American Forest & Paper Ass'n. v. EPA*, 137 F.3d 291, 296-297 (5th Cir.1998) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir.1987)("*NOPSI*")). USWAG argues that their challenge involves a pure question of law that is ripe for consideration. This Court has held, however, that even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness. *See American Forest*, 137 F.3d at 296 (holding that purely legal issue was ripe for review because injuries were not speculative and deferring review would impose an immediate, significant burden on the petitioner); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir.1993) (holding that purely legal issue of whether Rocky Mountain was liable to indemnify Chevron for any plug and abandon obligations was ripe because there was a substantial possibility that Chevron would be required to plug and abandon the wells); *NOPSI*, 833 F.2d at 588 (holding that plaintiffs' suit to enjoin city council from forcing plaintiffs to absorb the cost of a nuclear power plant was not ripe because city council had only announced an inquiry into the issue of who should pay for the power plant and that there was only a possibility of harm to plaintiffs).

In this case, USWAG has identified no State or local regulations that it contends TSCA should preempt. Nor has USWAG offered evidence that it will suffer hardship if we

defer consideration of this issue. Based on this record, we conclude that any hardship that USWAG could suffer is conjectural and thus, the issue is not ripe for review.

B

Storage for Reuse

The Final Rule authorizes members of the regulated industry to store PCB Articles[3] for reuse. 40 C.F.R. § 761.35. Under § 761.35, an owner/operator may store PCB Articles indefinitely in storage units constructed to contain spills or releases of PCBs. 40 C.F.R. § 761.35(c). PCBs may also be stored in any other area if the owner or operator of the PCB Article: (1) follows the use and marking requirements for PCB Articles; (2) maintains records indicating the date the PCB Article was removed from use, the projected location and anticipated use of the PCB Article, and, if applicable, the date the PCB Article is scheduled for repair; and (3) if the owner or operator wants to store the PCB Article for more than five years, he must receive written approval from EPA Regional Administrator for the region in which the PCB Article is stored. 40 C.F.R. §§ 761.35(a) and (b). These restrictions on storage for reuse affect utility companies because, as EPA stated in the NPRM:

> [transformers] can easily have an active service life of more than 40 years [and] disposing of this equipment prematurely based upon an arbitrary time limit would not be economically prudent nor serve any environmental goals. Placing such a piece of electrical equipment in storage for reuse to be used as a spare or in emergency situations is both prudent and economically sound.

59 Fed.Reg. at 62,822.

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[3] "PCB Article" means any manufactured article that contains PCBs or whose surface has been in direct contact with PCBs, such as capacitors, transformers, electric motors, pumps, and pipes. 40 C.F.R. § 761.3.

USWAG argues that EPA previously authorized storage for reuse in its 1982 Rulemaking and that Final Rule § 761.35 imposes new restrictions on the storage for reuse of PCB Articles. According to USWAG, we should vacate § 761.35 because EPA lacks substantial evidence in the record to support its restrictions on the storage for reuse of PCB Articles. In addition, USWAG argues, as an independent basis for vacating § 761.35, that EPA failed to respond to a multitude of comments requesting a national variance for electric utilities.

1

1982 Rulemaking

EPA authorized storage for reuse for certain PCB Articles in its 1982 Rulemaking.[4] EPA explains that by 1991 it became aware of risks posed by PCB Articles in storage for reuse that it did not anticipate when it promulgated the 1982 regulations. 56 Fed.Reg. at 26,742. According to EPA, it became aware that regulated entities were engaging in "sham storage," that is, storage of PCB Articles with no intent to reuse the Articles in order to circumvent stringent disposal requirements. *Id.* EPA further contends that it became aware of reports of electrical equipment "held 'in storage' " for prolonged periods of time and "abuses" of the storage for reuse rules by "brokers, junk yards, [and] service shops." 56 Fed.Reg. at 26,742; 59 Fed.Reg. at 62,822.

In the instant rulemaking, EPA received a comment from the State of Connecticut's Department of Environmental Protection that warned "it is clear that . . . some limitations must be imposed on the long-abused 'storage for reuse'

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[4] *See* 47 Fed.Reg. 37,342, 37344 (Aug. 25, 1982). *See also id.* at 37,357 (use conditions for PCB Transformers "in use or stored for reuse") (text of § 761.30(a)(1)(ii)); *id.* at 37,358 (conditions for "use and storage for reuse" of electromagnets, switches, and voltage regulators)(text of § 761.30(h)(1)(I)).

status. . . ." State of Connecticut Comments, R.C1-249 at 3. The Department of Energy ("DOE") also submitted comments indicating the prevalence of abuse of storage for reuse. According to DOE:

> as EPA points out, often equipment stored for "reuse" in junkyards, service shops, brokers, etc. is in disrepair or is damaged. DOE agrees that these specific situations must be eliminated while still allowing legitimate storage for reuse to continue.

Comments of DOE, R.C1-147 at 77.

EPA argues that it imposed the § 761.35 requirements to curb such abuse of the previous "storage for reuse" rule. The record amply supports this decision to strengthen the "storage for reuse" regulations to prevent practices that pose an unreasonable risk to health and the environment. EPA's decision to change its previous storage for reuse authorization was neither arbitrary nor capricious.

2

Response to Comments

USWAG also argues that EPA failed to respond to industry comments requesting a national variance from compliance with this rule for electric utilities. Section 553(c) of the EPA requires an agency to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The scope and degree of detail required by § 553(c) depends on the scope and detail provided in the comments. *See* Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* § 7.4, at 312 (3d ed.1994).

In the NPRM, EPA specifically requested comments from the regulated community on the appropriateness of a national

variance from the proposed requirements of § 761.35.[5] USWAG argues that we must vacate the restrictions on storage for reuse because EPA failed to respond to fifteen comments specifically requesting a national variance from § 761.35 for electrical utilities.

EPA admits that it did not state explicitly why it declined to grant industry demands for a national exemption for the electric utility industry. However, EPA argues that after considering comments from a number of sources, it evaluated the risks, benefits and burdens associated with the storage for reuse of PCB Articles, and concluded that it could not give the electric utility industry a blanket exemption from § 761.35. EPA also argues that the storage for reuse requirements promulgated in the Final Rule are less rigorous than the storage for reuse requirements proposed in the NPRM and that the Final Rule it adopted was EPA's comprehensive response to all the comments on storage for reuse, including the electric utilities' requests for a national variance. We conclude that EPA's rationale is insufficient.

EPA's specific request for comments on the appropriateness of a national variance and the numerous comments that EPA received on this request required EPA to give reasons for declining to promulgate a national variance. But EPA's failure to explain why it did not adopt a national variance does not require vacatur. Courts have explained that "remand is generally appropriate when 'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.' " *See Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C.Cir.1999)(quoting *Allied-Signal, Inc. v. United States*

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[5] "EPA also requests comment on the inclusion of site-specific or *nationwide exemption* or waiver provisions. . . ." 59 Fed.Reg. at 62,822 (emphasis added).

Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C.Cir.1993)). EPA may well be able to justify its decision to refuse to promulgate a national variance for the electric utilities and it would be disruptive to vacate a rule that applies to other members of the regulated community.[6] Accordingly, we remand, without vacatur, Final Rule § 761.35 for EPA to provide a reasoned statement of why it did not grant a national variance for the electric utility industry.

C

Small Transformers

Another issue that EPA considered in the rulemaking process was the adoption of assumptions for classifying transformers containing PCBs for the purpose of determining how those transformers should be regulated during the time they are in use. 63 Fed.Reg. at 35,436-37. These regulatory assumptions are critical because the applicable controls depend on what category of transformer is being regulated: transformers containing ≥ 500 ppm[7] PCBs are defined as "PCB Transformers" and are subject to the most stringent use controls (including labeling, inspections and registration requirements, as well as location restrictions); transformers containing ≥ 50 to < 500 ppm PCBs are defined as "PCB-contaminated Electrical Equipment" and are subject to less onerous use controls; and transformers containing < 50 ppm PCBs generally are not regulated for purposes of use. 40 C.F.R. §§ 761.3 and 761.30(a).

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[6] The Rule regulating storage for reuse applies to all members of the regulated community including junkyards, service shops, brokers, and electric utilities. EPA gave ample reasons for its application of the Rule to the members of the regulated community in general. It simply failed to explain why it refused to grant the national variance to the electric utilities. We conclude that it would be disruptive to vacate application of the Rule to other segments of the industry.

[7] ppm = parts per million.

In NPRM, EPA requested comment on how to classify, for purposes of the above regulatory assumptions, a particular category of transformers characterized as "small transformers":

> [t]he Agency is seeking information regarding numbers of small transformers or other electrical equipment that contains PCBs. . . . Some examples of this type of equipment are: potential transformers, current transformers. . . . These small transformers can range in size from several inches to several feet in height. . . . Since these smaller transformers generally do not have a nameplate, under the proposed amendment to § 761.3 [the definition of "PCB Transformer"] they *would have to be assumed* to be PCB Transformers and would be subject to the [PCB Transformer] use requirements . . . and the disposal requirements. . . .
>
> The Agency is also soliciting comments regarding the disposal requirements that could be imposed on these small transformers or other similar types of small electrical equipment.

59 Fed.Reg. at 62,820 (emphasis added).

In response to this request for information, USWAG and others submitted comments explaining why EPA should not include "small transformers" within the regulatory assumption rule for "PCB Transformers." In addition to providing EPA with information on the uses and manufacture of the various types of "small transformers," USWAG provided EPA with the results of an electric utility industry survey. This survey challenged EPA's factual basis for concluding that the millions of "small transformers" in use throughout the electric utility industry are "PCB Transformers" (i.e., contain ≥ 500 ppm PCBs). Only one percent (1%) of the small transformers evaluated in the survey were found to meet the definition of a "PCB

Transformer." However, USWAG did not provide EPA with the data supporting the survey results and, therefore, that data is not part of the rulemaking record.

On the basis of the survey results, USWAG urged EPA not to include "small transformers" within the regulatory assumption rule that would classify them as "PCB Transformers." Instead, USWAG urged EPA to include "small transformers" within the regulatory assumption rule for PCB-Contaminated Electrical Equipment.[8] USWAG also requested that EPA regulate small transformers containing less than three pounds of fluid in the same manner as Small Capacitors (which are essentially viewed as non-PCB equipment) and that EPA view "dry-type" small transformers as non-PCB and thus exempt from PCB controls.

In the Final Rule, EPA concluded that the following transformers could be assumed to contain less than 50 ppm PCBs (and hence not subject to any PCB controls during use): (1) non-liquid filled transformers; (2) transformers containing less than 3 pounds of fluid; (3) transformers manufactured on or after July 2, 1979, the effective date of TSCA's PCB ban; (4) certain mineral oil transformers of any volume; and (5) pad-mounted and pole-top transformers. 40 C.F.R. §§ 761.2(a)(1)-(4). However, the rule assumes that "small transformers" and other transformers that meet the

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[8] The regulatory assumptions apply only to untested equipment. An owner of PCB-containing electrical equipment can establish the actual PCB concentration in the equipment, either through testing or the use of qualified documentation, and not rely on the regulatory assumptions. 63 Fed.Reg. at 35,389. However, as USWAG points out in their comments, most "small transformers" are hermetically sealed during manufacture, making testing impossible without destroying the integrity of the unit. Pet. Comments at 62. Hence, most owners/operators of "small transformers" must, as a practical matter, rely on the regulatory assumptions for purposes of classifying this equipment.

§ 761.2(a)(3) criteria,[9] are "PCB Transformers." In support of this conclusion, EPA reasoned that it is exceedingly difficult to determine the contents and date of manufacture of these small transformers.

USWAG argues that neither EPA's Final Rule nor its Response to Comments discusses or challenges the validity of the survey results supplied by USWAG or the data in other comments demonstrating that less than 1% of "small transformers" contain > 500 ppm PCBs.

EPA argues that as a result of comments by USWAG and others it modified the proposed assumption extensively to reflect these comments. EPA argues that it did not further modify the assumption because, when taken together, EPA's evidence of the dangers that PCBs pose, the large number of PCB Transformers manufactured that contain high levels of PCBs, and the improper practices of some transformer owners[10] and operators support the promulgation of the assumption rule.

We conclude that EPA's decision not to exclude the transformers identified by USWAG in its survey from the assumption rule was not arbitrary and capricious. USWAG did not introduce into the record the data supporting its survey and there was no other evidence in the record that

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[9] Section 761.2(a)(3) provides that:

> [a]ny person must assume that a transformer manufactured prior to July 2, 1979, that contains . . . 3 pounds . . . or more of fluid other than mineral oil and whose PCB concentration is not established, is a PCB Transformer (i.e., > 500 ppm). If the date of manufacture and the type of dielectric fluid is unknown, any person must assume the transformer to be a PCB Transformer.

[10] According to EPA, it uncovered evidence that some transformer owners removed the manufacturer's nameplate, which generally provides the only evidence of the level of PCBs in the transformer, from PCB transformers to avoid properly disposing them. 56 Fed.Reg. at 26,741.

could support a conclusion that the types of small transformers surveyed by USWAG should not be classified as PCB Transformers.

IV

GE Petition

GE argues that EPA, in promulgating the Final Rule, overestimated the carcinogenicity of PCBs. GE also challenges the Final Rule's provisions regarding the decontamination of painted metal surfaces and concrete.

A

PCB Risk Assumption

The TSCA requires that any EPA rule concerning PCBs must not cause an "unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(1)(A), (2)(B). Pursuant to this requirement, the Final Rule establishes new PCB remediation and decontamination options based on: (1) EPA's estimate of the toxicity of PCBs; and (2) EPA's estimate of the frequency, duration and extent of human exposure to PCBs. *See* 63 Fed.Reg. 35,384, 35,385; U.S. E.P.A., *Assessment of Risks Associated with the PCB Disposal Amendments* (Versa, May 11, 1998). To define the toxicity of PCBs, EPA used a numerical estimate of the cancer potency of PCBs (often called "cancer potency factor" or "C.F.") of 4.0 $(mg/kg/day)^{-1}$.[11] 63 Fed.Reg. at 35,386.

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[11] To assess the risk of acquiring cancer (as opposed to a non- cancer health effect) from exposure to a substance, EPA uses a risk assessment method based on a non-linear model. The C.F. expresses the carcinogenic potential of the substance in question; the higher the value, the more likely the substance is to cause cancer at any particular dose level. When EPA published the PCB Spill Cleanup Policy, 52 Fed.Reg. 10,688, 10,696 (Apr. 2, 1987), the agency used a C.F. of 4.0 $(mg/kg/day)^{-1}$ to develop the risk-based standards which formed the basis of the Proposed Rule. EPA subsequently issued a new assessment of the cancer risk from

GE argues that in setting the risk-based standards, EPA overestimated the health risk posed by PCBs. According to GE, the record does not support EPA's use of the C.F. of 4.0 $(mg/kg/day)^{-1}$, and contends that the appropriate C.F. for PCBs is less than 2.0 $(mg/kg/day)^{-1}$.

EPA counters that TSCA permits it to consider other factors such as unknown threats to human health or the environment. According to EPA, it raised the C.F. from the range of 0.1 to 2.0 $(mg/kg/day)^{-1}$ to 4.0 $(mg/kg/day)^{-1}$ in order to protect against non-cancer and environmental risks. In its Response to Comments, EPA states that:

> while the 4.0 $(mg/kg/day)^{-1}$ slope factor does not correspond with any of the cancer slope factors in the September 1996 report [the Reassessment], it does allow for additional protection from as yet unquantified risks from non-cancer human health effects and effects to the environment.

U.S. E.P.A., *Response to Comments Document on the Proposed Rule—Disposal of Polychlorinated Biphenyls* (May 1998).

EPA is in the process of conducting a comprehensive assessment of the non-cancer toxic effects of PCBs.[12] According to EPA, it promulgated the Final Rule before the assessment was completed, in order to comply with the desires of the regulated community to finalize the rulemaking as soon as possible. However, EPA states that it has already committed to reexamine the toxicity of PCBs and has no objection to a remand so that it can consider the results of the

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exposure to PCBs that indicated that the upper bound C.F. that would be appropriate for assessing cancer risk from PCBs was 2.0 $(mg/kg/day)^{-1}$. 1996 Reassessment.

[12] According to EPA the assessment of the health effects of PCBs will be completed by fiscal year 2000 or 2001. 65 Fed.Reg. 1863.

assessment. Therefore, we remand §§ 761.61(a) and 761.79(b) to give EPA an opportunity to complete its assessment and reconsider the Final Rule in light of its study.[13]

B

Decontamination of PCB-Contaminated Equipment and Structures for Distribution or Use in Commerce

The Final Rule prohibits the distribution in commerce of any equipment or structures that have been contaminated with PCBs in excess of 50 ppm. 40 C.F.R. § 761.20(c)(5). The Final Rule also prohibits the use of equipment or structures that have been contaminated with PCBs in excess of 50 ppm. 40 C.F.R. § 761.30(u). The rule provides a single exception to these prohibitions where the equipment or structures have been decontaminated in accordance with Final Rule § 761.79. GE contends that we should vacate the Final Rule's stringent procedures for decontaminating equipment and structures contaminated by PCBs because they are not supported by substantial evidence in the record and because EPA failed to abide by the notice and comment requirements.

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[13] GE further argues that, as a condition on the remand, we should direct that the remand be completed and a new rule be promulgated within three years of the mandate issuing in this case. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579, 590 (5th Cir.1981)(holding that "[i]n hearing a petition for review, a court of appeals may exercise equitable powers in its choice of remedy, as long as the court remains within the bounds of statute and does not intrude into the administrative province."). GE does not cite any cases in which a court, through an exercise of its equitable powers, imposed such a time limit on remand. Although we recognize that the PCB Mega-Rulemaking was an arduous seven-year affair and that GE will not obtain full relief until EPA completes further rulemaking on the cancer risk presented by PCBs, we decline to impose particular time limits in this area of activity within the province of the Executive Branch. If, following the remand, GE believes that EPA is unduly delaying the promulgation of a new rule, it may seek a writ of mandamus compelling EPA to expedite its rulemaking.

1

Decontamination of Painted Surfaces

The Final Rule states that painted metal surfaces contaminated by spills ≥ 50 ppm are considered to be "decontaminated" if the paint is removed to Visual Standard No.2, Near-White Blast Cleaned Surface Finish, of the National Association of Corrosion Engineers ("NACE").[14] 40 C.F.R. § 761.79(b)(3)(i)(B). GE argues that EPA, in enacting this provision, violated the notice and comment requirements of the APA by failing to mention the NACE standard in any preamble or proposed regulatory language, which had the effect of preventing potential comment on that standard.

a

Notice and Comment

The record reflects that despite GE's protestations to the contrary, it had ample opportunity to comment on the requirements for decontaminating porous surfaces. GE submitted two sets of comments calling for EPA to allow the decontamination of porous surfaces and offering suggestions for methods of decontamination. Its suggestions included blasting, scarification, and removal with solvents and abrasives, *GE Comments*, C1-242, at 77-80, and C1-303, at 20. These and other comments demonstrate that GE knew that EPA was likely to consider a wide range of decontamination options for porous surfaces. Because GE had knowledge of the problem EPA was attempting to solve and had full opportunity to comment on the solution to the problem, GE fails to expose any violation of EPA's notice and comment requirements.

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[14] The NACE standard is a "Visual Standard for Surfaces of New Steel Centrifugally Blast Cleaned with Steel Grit and Shot."

b

Arbitrary and Capricious

GE argues that Final Rule § 761.79(b)(3)(i)(B) is not supported by substantial evidence because: (1) there is no substantial evidence showing that EPA should require paint removal for decontamination, and (2) while the NACE standard adopted by EPA is tailored to a specific cleaning technology, no evidence in the record suggests that the cleaning methods authorized by EPA can be used to satisfy NACE.

According to GE, EPA's PCB Spill Policy ("Spill Policy") previously defined painted surfaces as "impervious," and allowed contaminated paint to be decontaminated by surface wiping.[15] 52 Fed.Reg. 10,705 (Apr. 2, 1987). GE contends there is no evidence in the record to support EPA's recent classification of painted metal surfaces as "porous," and requiring complete removal of contaminated paint. However, there is no evidence in the record that suggests that paint is not porous to spills of liquid PCBs and EPA provides a sensible explanation for the rule change.[16] As such, we reject GE's argument that the painted metal surface provision of § 761.79(b)(3)(I)(B) must be vacated because EPA's requirement that PCB contaminated paint be removed is not arbitrary and capricious.

According to GE, compliance with the visual NACE standard cannot be achieved by using the cleaning methods authorized by EPA in the Final Rule. See 40 C.F.R.

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[15] Under the PCB Spill Policy recently discovered contaminated painted surfaces could be decontaminated by wiping the paint so that the surface contamination was less than 10 $\mu g/100\ cm^2$.

[16] EPA argues that the Spill Policy was badly phrased in that it allowed the industry to use the wipe test on old spills that were recently discovered. EPA was persuaded that in these situations the wipe test was inadequate to remove PCBs after they had penetrated the paint.

§ 761.79(b) (authorizing *inter alia* chopping, scraping, scarification, or the use of abrasives or solvents). GE argues that the Final Rule effectively requires it to blast its contaminated equipment with grit/steel shot which will either destroy or severely diminish the economic value of the machines and eliminate the option of distributing the equipment in commerce for continued use.

Contrary to GE's assertion, EPA does not interpret the rule in a manner that would require GE to use grit/steel shot cleaning methods. Rather, as EPA explains, parties can meet the standard by using the cleaning methods authorized in the Final Rule so long as the metal surface is left free of foreign matter except for light shadows or streaks. Because the Final Rule does not require paint to be removed by blasting the contaminated surface with grit/steel shot, we conclude that it is not arbitrary and capricious.

2

Concrete

The Final Rule allows an owner to use, but not distribute in commerce, concrete on which PCBs ≥ 50 ppm have been spilled. But this use is subject to a number of conditions.[17] First, the owner must clean accessible surfaces. 40 C.F.R. § 761.30(p)(ii). After cleaning, the owner must then coat the surfaces and place signs warning of the presence of PCBs. 40 C.F.R. § 761.30(p)(iii)(A), (B). These post-cleaning conditions apply regardless of the residual level of PCB contamination in or on the concrete. For example, if concrete is cleaned to a level below the 10 Sg/100 cm^2, the owner must still coat the concrete and mark it as PCB-contaminated.

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[17] If the cleanup begins within 72 hours of the spill and the 10 μg/100 cm^2 level is reached, then the concrete can be used without restrictions. 40 C.F.R. § 761.30(u). 10 Sg/Liter = 10 micrograms per Liter.

GE argues that Final Rule § 761.30(p)(1)(iii) requires regulated entities to coat and mark concrete to a level below that which EPA has agreed does not pose a substantial risk of injury. Consequently, GE contends the record does not support such stringent cleaning requirements. GE also argues that this cleaning requirement contradicts EPA's long-standing Spill Policy, which does not impose such requirements if concrete is cleaned to the 10 $\mu g/100\ cm^2$ level.

EPA counters that the 10 $\mu g/100\ cm^2$ requirement measures only the surface concentration of PCBs; not the amount of PCBs that have soaked into a porous material. Surface cleaning of porous surfaces such as concrete will not clean up PCB spills that have soaked into the concrete. Therefore, as explained in the Final Rule, EPA requires that parties not only clean the spill area's surface, but also coat and mark it in order to warn of possible deeper PCB contamination in the material. 63 Fed.Reg. at 35,398 ("EPA believes that the use conditions specified in § 761.30(p) will effectively prevent exposure to any residual PCBs in the contaminated porous material and therefore continued use of this material will not present an unreasonable risk.").

The record shows without contradiction that the decontamination of concrete poses particular challenges because of its porousness. Moreover, several commentors, including GE, commented that encapsulation (i.e. covering contaminated concrete with fresh concrete and/or a sealant) is a feasible means of preventing "wicking back" of PCBs to the surface. *GE Comments*, R.C1-034, at 31; *American Electric Power Comments*, C1-029, at 15; *Tenneco Gas Comments*, C1-154, at 63. Our review of the record leads us to conclude that EPA's cleaning, painting and marking requirements are not arbitrary and capricious.

V

Sierra Club Petition

In its petition, Sierra Club challenges EPA's promulgation of several sections of the Final Rule relating to the disposal of PCB bulk product waste.[18] Specifically, Sierra Club argues that: (1) EPA failed to provide notice and an opportunity for comment on Final Rule § 761.62(d), which permits the disposal of "PCB bulk product waste" as daily landfill cover and under asphalt road beds; (2) EPA failed to provide notice and an opportunity for comment on Final Rule § 761.62(b), which allows disposal of PCB bulk product waste in ordinary landfills regardless of the PCB concentration in the waste; (3) that Final Rule § 761.62(b)(1)(i)'s assumption that PCB bulk waste product does not leach is not supported by substantial evidence; (4) that Final Rule § 761.62(b)(1)(ii)'s adoption of a water-based leachability test is not supported by substantial evidence. Essentially, Sierra Club challenges the Final Rule's assumption that PCB bulk product waste does not leach PCBs and, accordingly, it is permissible to allow the disposal of PCB bulk product waste in landfills and under asphalt as roadbed. Before we can reach the merits of Sierra Club's petition, however, we must consider whether it has standing.

An association has standing to bring a suit on behalf of its members when: (1) its members would otherwise have

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[18] PCB bulk product waste includes:

> [p]lastics (such as plastic insulation from wire or cable; radio, television and computer casings; vehicle parts; or furniture laminates); preformed or molded rubber parts and components; applied dried paints, varnishes, waxes or other similar coatings or sealants; caulking; Galbestos; non-liquid building demolition debris; or non-liquid PCB bulk product waste from the shredding of automobiles or household appliances from which PCB small capacitors have been removed (shredder fluff).

Final Rule § 761.62(b)(1)(i).

standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Texans United For a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir., 2000). The individual plaintiffs can satisfy their "irreducible constitutional minimum" of standing by demonstrating that: (1) they have suffered an actual or threatened injury; (2) the injury is "fairly traceable" to the defendant's action; and (3) the injury will likely be redressed if the plaintiffs prevail in the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Texans United*, 207 F.3d at 792.

Sierra Club's challenge to EPA's rulemaking centers around the TSCA's procedural requirements that EPA provide notice and an opportunity to comment on proposed rules. Such a challenge to EPA's purported failure to abide by a procedural requirement in rulemaking is analyzed under the somewhat more lenient requirements of standing for procedural rights cases. *See Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664-65 (holding that petitioners' standing in challenging IRS's rulemaking, in which IRS promulgated a tax credit for gasoline additives without preparing an environmental impact, is determined in accordance with "procedural-rights" line of cases deriving from *Lujan*). In *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir.1998), we outlined the standing requirements for a plaintiff seeking redress for violations of procedural rights:

> in a procedural rights case . . . a plaintiff is not held to the normal standards for redressibility and immediacy. This does not mean, however, that a procedural rights plaintiff has standing merely because of the

> government's failure to comply with the relevant procedural requirements. Instead, the plaintiff must show an injury that is both concrete and particular, as opposed to an undifferentiated interest in the proper application of the law.

Id. at 613.

Sierra Club argues that EPA's failure both to provide notice and comment in the promulgation of Final Rule §§ 761.62(b) and (d) and to support Final Rule §§ 761.62(b)(1)(i) and (ii) with substantial evidence will result in injury to the health, environmental and recreational interests of Sierra Club members. According to Sierra Club, the Final Rule creates a risk that PCBs will leach from bulk product wastes in either landfills or roadbeds and contaminate water supplies. Sierra Club further contends that the use of PCB bulk product waste as daily landfill cover will result in a contamination of the ambient air with PCBs. To establish this injury in fact, Sierra Club relies on the affidavits of two Sierra Club Members, Dr. Neil Carman (" Dr. Carman") and Martha Sinclair ("Sinclair") (collectively "Affiants").

In his affidavit, Dr. Carman claims that he will sustain injuries because the Final Rule allows the disposal of PCB bulk product waste as landfill and as roadbed. Dr. Carman states that "the landfill used by [his] town does not have an impermeable underlayer to prevent the migration of contaminants offsite." Thus, the practices of disposing of PCB bulk product waste and using PCB bulk product waste as daily cover pose "a significant risk of PCB contamination to [his] neighborhood and his town's water supply." Dr. Carman also expressed a concern that:

> if PCB contaminated road bed material was used in the reconstruction of Routes 71 and 290 West as well as south MOPAC, those roads cross over the Edwards aquifer that in turn supplies drinking water to the City of Austin through significant flows into the Colorado

> River. I and my family also frequently swim at the Barton Springs pool that is fed directly by this aquifer. Because the asphalt road cover on our roads regularly allows water to enter the underlying road bed material through cracks, heaves and the many, omnipresent potholes, PCBs could leach from the roadbed material into Barton Springs and the City of Austin's water supply.

In her affidavit, Sinclair states, that she regularly travels on roads that are subject to being repaired or replaced with asphalt. According to Sinclair:

> I . . . would be at risk for exposure to PCBs released into the air if PCB waste is transported to road construction areas, and stored at road construction areas in heaps or in trucks. I am also at risk in breathing dust released during road construction. PCB contaminants could also enter the waters I use for recreation and drinking when washed during rainfall and flood events from road construction sites to the Ohio River and other surface waters. The Ohio River serves as a drinking water source and a fisheries providing additional routes of PCB exposure for Ohioans including me.

She also contends that disposal of PCB bulk wastes in landfills poses a potential risk to landfill workers and contractors. However, a party may not base its Article III standing on alleged injuries to others. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,—U.S.—120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000); *Lujan* 504 U.S. at 578, 112 S.Ct. at 2146. Accordingly, we consider only Carman and Sinclair's claims of injury to themselves.

A

Leach from Landfill

Under the Final Rule, PCB bulk product waste is presumed to leach at levels less than the PCB leachate limit of

10 μg/liter. Thus, PCB bulk product waste may be disposed of irrespective of its actual concentration of PCBs.

Sierra Club argues that the leach test, used by EPA to determine that PCB bulk product waste leaches under the 10 μg/liter limit, is flawed because it does not properly simulate conditions that contain organic solvents, such as toluene and acetone. According to Sierra Club, these organic solvents cause PCB bulk product waste to leach at levels higher than 10 Sg/liter. Therefore, Sierra Club argues that PCB bulk product waste disposed of in landfills will leach into the ground below landfills, at levels significantly higher than 10 μg/Liter and contaminate the environment.

Dr. Carman alleges that PCB bulk product waste disposed of in his town's landfill may leach from the landfill and somehow enter the town's water supply. But Carman presents no facts to support this concern. He produced no facts establishing the relative location of the landfill and the aquifer so that it is purely conjectural that PCB's could leach from the landfill and contaminate his town's water supply. This subjective concern, therefore, cannot serve as the basis for Sierra Club's standing. As the Supreme Court has explained, "[s]tanding is not an ingenious academic exercise in the conceivable, but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm." *Lujan*, 504 U.S. at 556, 112 S.Ct. at 2139.

This court and the Supreme Court have consistently held that, in order to establish Article III standing, petitioner must "have a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.*, 73 F.3d 546, 555-56 (5th Cir.1996); *see also Friends of the Earth*, 120 S.Ct. at 705. Moreover, "[i]t is the reality of the threat of [impending] injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Los Angeles v. Lyons*, 461 U.S. 95, 107, n.8, 103 S.Ct. 1660, 1668, 75 L.Ed.2d 675 (1983). In *Friends of the Earth*, for example, petitioner sued

Laidlaw under the Clean Water Act for discharging pollutants into a river in excess of permit limits. —U.S.—, 120 S.Ct. at 702. Petitioner's members testified *inter alia* that they had used the river for recreational activities in the past and that, but for Laidlaw's discharge of pollutants, they would continue to use the river. *Id.* at 704-05. The Supreme Court held that petitioner had stated an injury in fact because "the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, *directly* affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 705 (emphasis added). Similarly, in *Cedar Point Oil*, 73 F.3d at 546, this court held that Sierra Club had established an injury in fact where its members testified that Cedar Point's discharge of pollutants into Galveston Bay would directly impair their enjoyment of recreational activities on the Bay. *Id.* at 555-56.

Unlike the petitioners in *Friends of the Earth* and *Cedar Point Oil*, Dr. Carman fails to establish any direct harm. While the petitioners in *Friends of the Earth* and *Cedar Point Oil* presented uncontroverted evidence that the pollutants they were challenging had entered the waterways that they enjoyed, Carman has not established the possibility that PCB bulk product wastes disposed of in his town's landfill could contaminate the aquifer that supplies his drinking water. As such, Dr. Carman has not identified a concrete injury sufficient to confer Article III standing. *See Lujan*, 504 U.S. at 566, 112 S.Ct. at 2139 ("standing . . . requires, at the summary judgment stage, a factual showing of perceptible harm.").

B

Roadbed

Sierra Club's challenge to provisions in the Final Rule that allow disposal of PCB bulk product waste as roadbed

material rests primarily on concerns that PCBs will leach from PCB bulk product waste disposed of in landfills. Again, Sierra Club has failed to produce facts that establish the requisite injury in fact.

Dr. Carman's theory of injury is predicated upon the occurrence of a string of future hypotheticals—that road construction will occur in proximity to the Edwards aquifer, that the construction crews will use PCB bulk product waste in the roadbed, that PCBs will leach from the roadbed, and that those PCB's will leach and contaminate aquifers or waterways. Nothing in the Carman and Sinclair affidavits suggest that any of these predicate events are likely to occur.

Even if we assume that road construction will occur over the Edwards aquifer, nothing in Dr. Carman's affidavit suggests that the construction crews will likely use PCB Bulk Product Waste as road bed for those particular roads. Moreover, Sierra Club has failed to establish any likelihood that, when used as roadbed, PCB Bulk Product Waste will leach PCBs. Sierra Club does not assert that PCB bulk product waste disposed of as roadbed will come into contact with organic solvents, which trigger the leaching of PCB's to harmful levels. Thus, Sierra Club has presented no evidence that supports an inference that such PCB bulk product waste will leach harmful PCBs. Finally, Sierra Club has failed to present any affidavits or other evidence explaining how PCBs, once leached from roadbeds, could migrate into aquifers and waterways.

Unlike the petitioners in *Friends of the Earth* and *Cedar Point Oil*, petitioners in this case cannot show that they are likely to suffer any direct and concrete injury as a result of the PCB Mega Rule. As we have explained, the requirement that a party demonstrate a direct and concrete injury in fact "is designed to limit access to the courts to those who have a direct stake in the outcome, as opposed to those who would convert the judicial process into no more than a vehicle for

the value interests of concerned bystanders." *Cedar Point Oil*, 73 F.3d at 546 (internal citations and quotations omitted). Dr. Carman's subjective fears and speculative string of events cannot possibly serve as the basis for standing. *See Los Angeles v. Lyons*, 461 U.S. at 107, n.8, 103 S.Ct. at 1668 ("[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.") *See also Glickman*, 156 F.3d at 613 (injury must be concrete and particular); *cf. Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259-60, 140 L.Ed.2d 406 (1998)(holding, under closely related ripeness doctrine, that Texas had not presented a justiciable claim because the proposed harm depended on the occurrence of numerous uncertain future events).

C

Airborne

Sinclair hypothesizes that she will be injured by airborne, dust-centered PCBs that will be released into the environment during road construction. However, no evidence in the record, except Sinclair's subjective statement of belief, supports the conclusion that PCB bulk product wastes generate PCB-laden dust. There is also no evidence indicating that Sinclair uses or will be using a road that is built on roadbed containing PCB bulk product waste. Therefore, Sinclair has failed to establish that, as a result of EPA's alleged failure to adhere to the notice and comment requirements, she suffers or is likely to suffer an injury in fact.

D

Conclusion

We conclude that Sierra Club has failed to demonstrate an injury in fact sufficient to confer Article III standing. The Affiants simply do not allege concrete injuries or threats of injury to their recreational, aesthetic, or economic interests.

Friends of the Earth, —U.S.—, 120 S.Ct. at 705. The affidavits do not demonstrate that Sinclair and Carman are threatened with injury from PCB's to any greater extent than any other person in the United States who drives on the country's roadways and drinks water in a town that has landfills. Thus, Sierra Club has failed to allege that EPA's promulgation of Final Rules §§ 761.62(b) and (d) will result in any tangible injury to any of its members. Accordingly, we are without authority to consider Sierra Club's petition.

VI

For the reasons stated above, we DISMISS USWAG and GE's petitions for review of EPA's PCB Mega-Rulemaking except for USWAG's challenge to Final Rule § 761.35 and GE's challenge to EPA's estimate of the toxicity of PCBs in §§ 761.61(a) and 761.67(b) [sic]. We REMAND § 761.35 to EPA in order to allow EPA to fully respond to comments and to explain why it did not grant a national variance for electric utilities. We REMAND §§ 761.61(a) and 761.79(b) to EPA so that it can complete its ongoing assessment of the non-cancer health effects of PCBs and reconsider the rule in light of this study. Because Sierra Club, through its members, has no standing to challenge the Final Rule we also DISMISS its petition for lack of jurisdiction.

APPENDIX B

[Filed Nov. 2, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60495

CENTRAL AND SOUTH WEST SERVICES, INC; ENTERGY SERVICES INCORPORATED; MISSISSIPPI POWER COMPANY; UTILITY SOLID WASTE ACTIVITIES GROUP
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent

No. 98-60642

GENERAL ELECTRIC COMPANY
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent

No. 98-60804

SIERRA CLUB, a non-profit California Corporation
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent

Petitions for Review of an Order of the
Environmental Protection Agency

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(opinion 8/15/00, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, CYNTHIA HOLCOMB HALL*, and SMITH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]

United States Circuit Judge

Chief Judge King, and Judges Wiener and Benavides did not participate in the consideration of the petitions for rehearing en banc.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

APPENDIX C

Section 6(e) of the Toxic Substances Control Act, codified at 15 U.S.C. § 2605(e)

15 U.S.C. § 2605. Regulation of hazardous chemical substances and mixtures

* * * *

(e) Polychlorinated biphenyls

(1) Within six months after January 1, 1977, the Administrator shall promulgate rules to—

(A) prescribe methods for the disposal of polychlorinated biphenyls, and

(B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).

(2)(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

(B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment.

(C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

(3)(A) Except as provided in subparagraphs (B) and (C)—

(i) no person may manufacture any polychlorinated biphenyl after two years after January 1, 1977, and

(ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.

(B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such an exemption if the Administrator finds that—

(i) an unreasonable risk of injury to health or environment would not result, and

(ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.

An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.

(C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one half years after October 11, 1976.

(4) Any rule under paragraph (1), (2)(B), or (3)(B) shall be promulgated in accordance with paragraphs (2), (3), and (4) of subsection (c) of this section.

(5) This subsection does not limit the authority of the Administrator, under any other provision of this chapter or any other Federal law, to take action respecting any polychlorinated biphenyl.

(Pub.L. 94-469, Title I, § 6, Oct. 11, 1976, 90 Stat. 2020; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

Section 18 of the Toxic Substances Control Act, codified at 15 U.S.C. § 2617

15 U.S.C. § 2617. Preemption

(a) Effect on State law

(1) Except as provided in paragraph (2), nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.

(2) Except as provided in subsection (b) of this section—

(A) if the Administrator requires by a rule promulgated under section 2603 of this title the testing of a chemical substance or mixture, no State or political subdivision may, after the effective date of such rule, establish or continue in effect a requirement for the testing of such substance or mixture for purposes similar to those for which testing is required under such rule; and

(B) if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a

chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act [42 U.S.C. § 7401 et seq.] or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

(b) Exemption

Upon application of a State or political subdivision of a State the Administrator may by rule exempt from subsection (a)(2) of this section, under such conditions as may be prescribed in such rule, a requirement of such State or political subdivision designed to protect against a risk of injury to health or the environment associated with a chemical substance, mixture, or article containing a chemical substance or mixture if—

(1) compliance with the requirement would not cause the manufacturing, processing, distribution in commerce, or use of the substance, mixture, or article to be in violation of the applicable requirement under this chapter described in subsection (a)(2) of this section, and

(2) the State or political subdivision requirement (A) provides a significantly higher degree of protection from such risk than the requirement under this chapter described in subsection (a)(2) of this section and (B)

does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.

(Pub.L. 94-469, Title I, § 18, Oct. 11, 1976, 90 Stat. 2038; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

Section 19 of the Toxic Substances Control Act, codified at 15 U.S.C. § 2618

15 U.S.C. § 2618. Judicial review

(a) In general

(1)(A) Not later than 60 days after the date of the promulgation of a rule under section 2603(a), 2604(a)(2), 2604(b)(4), 2605(a), 2605(c) or 2607 of this title, or under subchapter II or IV of this chapter, any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(B) Courts of appeals of the United States, shall have exclusive jurisdiction of any action to obtain judicial review (other than in at enforcement proceeding) of an order issued under subparagraph (A or (B) of section 2605(b)(1) of this title if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(2) Copies of any petition filed under paragraph (l)(A) shall be transmitted forthwith to the Administrator and to the Attorney General by the clerk of the court with which such petition was filed. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of

proceedings on which the Administrator based the rule being reviewed under this section and to the transfer of proceedings between United States courts of appeals.

(3) For purposes of this section, the term "rulemaking record means—

(A) the rule being reviewed under this section;

(B) in the case of a rule under section 2603(a) of this title, the finding required by such section, in the case of a rule under section 2604(b)(4) of this title, the finding required by such section, in the case of a rule under section 2605(a) of this title the finding required by section 2604(f) or 2605(a) of this title, as the case may be, in the case of a rule under section 2605(a) at this title, the statement required by section 2605(c)(1) of this title, and in the case of a rule under section 2605(e) of this title the findings required by paragraph (2)(B) or (3)(B) of such section, as the case may be[1] and in the case of a rule under subchapter IV of this chapter, the finding required for the issuance of such a rule;

(C) any transcript required to be made of oral presentations made in proceedings for the promulgation of such rule;

(D) any written submission of interested parties respecting the promulgation of such rule; and

(E) any other information which the Administrator considers to be relevant to such rule and which the Administrator identified, on or before the date of the promulgation of such rule, in a notice published in the Federal Register.

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[1] So in original. Probably should be followed by a comma.

(b) Additional submissions and presentations; modifications

If in an action under this section to review a rule the petitioner or the Administrator applies to the court for leave to make additional oral submissions or written presentations respecting such rule and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Administrator, the court may order the Administrator to provide additional opportunity to make such submissions and presentations. The Administrator may modify or set aside the rule being reviewed or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(c) Standard of review

(l)(A) Upon the filing of a petition under subsection (a)(l) of this section for judicial review of a rule, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of Title 5, and (ii) except as otherwise provided in subparagraph (B), to review such rule in accordance with chapter 7 of Title 5.

(B) Section 706 of Title 5 shall apply to review of a rule under this section, except that—

> (i) in the case of review of a rule under section 2603(a), 2604(b)(4), 2605(a), or 2605(e) of this title, the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3) of this section) taken as a whole;

(ii) in the case of review of a rule under section 2605(a) of this title, the court shall hold unlawful and set aside such rule if it finds that—

(I) a determination by the Administrator under section 2605(c)(3) of this title that the petitioner seeking review of such rule is not entitled to conduct (or have conducted) cross-examination or to present rebuttal submissions, or

(II) a rule of, or ruling by, the Administrator under section 2605(c)(3) of this title limiting such petitioner's cross examination or oral presentations,

has precluded disclosure of disputed material facts which was necessary to a fair determination by the Administrator of the rulemaking proceeding taken as a whole; and section 706(2)(D) shall not apply with respect to a determination, rule, or ruling referred to in subclause (I) or (II); and

(iii) the court may not review the contents and adequacy of—

(I) any statement required to be made pursuant to section 2605(c)(1) of this title, or

(II) any statement of basis and purpose required by section 553(c) of Title 5, to be incorporated in the rule

except as part of a review of the rulemaking record taken as a whole.

The term "evidence" as used in clause (i) means any matter in the rulemaking record.

(C) A determination, rule, or ruling of the Administrator described in subparagraph (B)(ii) may be reviewed only in an action under this section and only in accordance with such subparagraph.

(2) The judgment of the court affirming or setting aside, in whole or in part, any rule reviewed in accordance with this

section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(d) Fees and costs

The decision of the court in an action commenced under subsection (a) of this section, or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

(e) Other remedies

The remedies as provided in this section shall be in addition to and not in lieu of any other remedies provided by law.

(Pub.L. 94-469, Title I, § 19, Oct. 11, 1976, 90 Stat. 2039; renumbered Title I and amended Pub.L. 99-519, § 3(b)(2), (c)(1), Oct. 22, 1986, 100 Stat. 2989; Pub.L. 102-550, Title X, § 1021(b)(8), Oct. 28, 1992, 106 Stat. 3923.)

APPENDIX D

STATUTES PROVIDING FOR IMMEDIATE JUDICIAL REVIEW OF NEW RULES

Set Forth In The Order Of Appearance
In The United States Code

FEDERAL TRADE COMMISSION ACT

15 U.S.C. § 57a. Unfair or deceptive acts or practices rulemaking proceedings

* * * *

(e) Judicial review; petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person . . . may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . . .

* * * *

SECURITIES EXCHANGE ACT

15 U.S.C. § 78y. Court review of orders and rules

* * * *

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission . . . may obtain review of this rule in the United States

Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

* * * *

FEDERAL ENERGY ADMINISTRATION AUTHORIZATION ACT OF 1977

15 U.S.C. § 766. Administrative provisions

* * * *

(c) Judicial review of administrative rulemaking; filing of petition in United States Court of Appeals

Judicial review of administrative rulemaking of general and national applicability done under this chapter . . . may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation, or order . . . .

* * * *

FLAMMABLE FABRICS ACT

15 U.S.C. § 1193. Flammability standards or regulations

* * * *

(e) Judicial review; additional information before Commission; applicability of sections 701 to 706 of Title 5; finality of judgment; survival of action

(1) Any person who will be adversely affected by any such standard or regulation or amendment thereto when it is effective may at any time prior to the sixtieth day after such standard or regulation or amendment thereto is issued file a petition with the United States court of appeals for the circuit

wherein such person resides or has his principal place of business, for a judicial review thereof. . . .

* * * *

CONSUMER PRODUCT SAFETY ACT

15 U.S.C. § 2060. Judicial review of consumer product safety rules

(a) Petition by persons adversely affected, consumers, or consumer organizations

Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia, or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. . . .

* * * *

TOXIC SUBSTANCE CONTROL ACT

15 U.S.C. § 2618. Judicial review

(a) In general

(1)(A) Not later than 60 days after the date of the promulgation of a rule . . . any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of

such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

* * * *

FISHERY-CONSERVATION AND MANAGEMENT ACT OF 1976

16 U.S.C. § 1855. Other requirements and authority

* * * *

(f) Judicial review

(1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable . . . .

* * * *

FEDERAL FOOD, DRUG, AND COSMETIC ACT

21 U.S.C. § 346a. Tolerances and exemptions for pesticide chemical residues

* * * *

(h) Judicial review

(1) Petition.

In a case of actual controversy as to the validity of any regulation issued under . . . this section, or any regulation that is the subject of such an order, any person who will be adversely affected by such order or regulation may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein that person resides or has its principal place of business, or in the United States Court of Appeals for

the District of Columbia Circuit, within 60 days after publication of such order or regulation, a petition praying that the order or regulation be set aside in whole or in part.

* * * *

21 U.S.C. § 360g. Judicial review

(a) Petition; record

Not later than thirty days after –

(1) the promulgation of a regulation under section 360c of this title . . .

(2) the promulgation of a regulation under section 360d of this title . . .

(4) the promulgation of a regulation under paragraph (3) of section 360e(b) of this title . . .

(5) the promulgation of a regulation under section 360f of this title [or] . . .

(9) a regulation under section 360e(i)(2) or 360j(l)(5)(B) of this title,

any person adversely affected by such regulation . . . may file a petition with the United States Court of Appeals for the District of Columbia or for the circuit wherein such person resides or has his principal place of business for judicial review of such regulation or order. . . .

* * * *

TITLE 28, CHAPTER 158 – ORDERS OF FEDERAL AGENCIES; REVIEW

28 U.S.C. § 2342. Jurisdiction of court of appeals
[note: must be read together with § 2344, infra]

The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . .

(3) all rules, regulations, or final orders of –

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 . . . or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to –

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d)[2] . . .

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title . . . .

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. . . .

* * * *

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[2] So in original. Probably should be followed by a closing parenthesis.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

30 U.S.C. § 1276. Judicial review

(a) Review by United States District Court; venue; filing of petition; time

(1) . . . Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. . . .

* * * *

CLEAN WATER ACT

33 U.S.C. § 1369. Administrative procedure and judicial review

* * * *

(b) Review of Administrator's action; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title . . . (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title . . . (E) in approving or promulgating any

effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title . . . and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

* * * *

OIL POLLUTION ACT OF 1990

33 U.S.C. § 2717. Litigation, jurisdiction, and venue

(a) Review of regulations

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

* * * *

SAFE DRINKING WATER ACT

42 U.S.C. § 300j-7. Judicial review

(a) Courts of appeals; petition for review; actions respecting regulations; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

A petition for review of –

(1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

(2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought . . . .

* * * *

THE PUBLIC HEALTH SERVICE ACT

42 U.S.C. § 300aa-32. Judicial review

A petition for review of a regulation under this part may be filed in a court of appeals of the United States within 60 days from the date of the promulgation of the regulation or after such date if such petition is based solely on grounds arising after such 60th day.

ATOMIC ENERGY ACT OF 1954

42 U.S.C. § 2022. Health and environment standards for uranium mill tailings

* * * *

(c) Publication in Federal Register; notice and hearing; consultations; judicial review; time for petition; venue; copy to Administrator; record; administrative jurisdiction; review by Supreme Court; effective date of rule

* * * *

(2) Judicial review of any rule promulgated under this section may be obtained by any interested person only upon such person filing a petition for review within sixty days after such promulgation in the United States court of appeals for the Federal judicial circuit in which such person resides or has his principal place of business. . . .

* * * *

NOISE CONTROL ACT

42 U.S.C. § 4915. Judicial review

(a) Petition for review

A petition for review of action of the Administrator of the Environmental Protection Agency in promulgating any standard or regulation . . . may be filed only in the United States Court of Appeals for the District of Columbia Circuit, and a petition for review of action of the Administrator of the Federal Aviation Administration in promulgating any standard or regulation under section 1431 of Title 49 Appendix may be filed only in such court. Any such petition shall be filed within ninety days from the date of such promulgation, or after such date if such petition is based solely on grounds arising after such ninetieth day. . . .

* * * *

ENERGY POLICY AND CONSERVATION ACT

42 U.S.C. § 6306. Administrative procedure and judicial review

* * * *

(b) Petition by persons adversely affected by rules; effect on other laws

(1) Any person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6295 of this title may, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . . .

* * * *

RESOURCE CONSERVATION AND RECOVERY ACT

42 U.S.C. § 6976. Judicial review

(a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5, except that –

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or

after such date if such petition for review is based solely on grounds arising after such ninetieth day . . . .

* * * *

CLEAN AIR ACT

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) . . . any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. . . .

* * * *

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

42 U.S.C. § 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. . . .

* * * *

PIPELINE SAFETY ACT OF 1992

49 U.S.C. § 60119. Judicial review

(a) Review of regulations and waiver orders

(1) . . . [A] person adversely affected by a regulation prescribed under this chapter or an order issued about an application for a waiver under section 60118(c) or (d) of this title may apply for review of the regulation or order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 89 days after the regulation is prescribed or order is issued. . . .

* * * *

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60495
(consolidated with Nos. 98-60642 & 98-60804)

CENTRAL AND SOUTH WEST SERVICES, INC., ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AND THE UTILITY SOLID WASTE ACTIVITIES GROUP,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF PETITIONERS CENTRAL AND SOUTH WEST SERVICES, INC., ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AND THE UTILITY SOLID WASTE ACTIVITIES GROUP,

---

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Dated: April 27, 1999

[Pages 27-28]

* * * *

Petitioners' preemption challenge presents a pure legal issue: whether TSCA Section 18 preempts state and local PCB disposal regulations that are more stringent than those promulgated by EPA under TSCA Section 6(e). Because this is a pure question of law that can be readily resolved without further factual development, the issue is ripe for review. *See American Forest and Paper Ass'n. v. EPA*, 137 F.3d 291, 296-297 (5th Cir. 1998) (pure legal question of EPA's statutory authority under the federal Clean Water Act ripe for review); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir. 1993) (a case is ripe for review if the only remaining question is a legal one). Moreover, the threat of applicability of more stringent state and local PCB disposal regulations is concrete and real: there exist a number of state PCB standards that are more stringent than those set forth in

the federal PCB Mega Rule.[11] [Page 28] The pure legal preemption issues are also plainly grounded in the facts.

Finally early resolution of Petitioners' claims will avoid confusion and possible serious disruption to Congress' mandate for a comprehensive and uniform national PCB cleanup and disposal program. *See Chemical Waste Management*, 869 F.2d at 1534 (no purpose served by delaying resolution of issue when agency has issued final pronouncement on subject that is "likely to impose some immediate consequences on petitioners."). There are many sites across the country that are undertaking, or planning to undertake, PCB cleanup and disposal activities. Unless the Court decides whether TSCA preempts competing and more stringent state and local PCB disposal laws, resolution of this issue will be battled on a state-by-state, case-by-case basis, which would pose tremendous burdens on Petitioners and unnecessarily tax judicial resources nationwide. This situa-

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[11] For example, in the final rule under review, EPA established cleanup and disposal standards for PCB remediation wastes that allow certain levels of PCBs to remain on-site after cleanup and authorizes the disposal of such wastes containing prescribed amounts of PCBs in municipal solid waste landfills. *See e.g.*, 63 Fed. Reg. at 35449 (codified at 40 C.F.R. 761.61(a)(4)(i)(B)(1)), R.A1-004 (setting forth cleanup standards of $\leq$ 25 ppm for PCB remediation wastes in industrial settings ("low occupancy" areas)). Compare the federal PCB soil limit in industrial settings of $\leq$ 25 ppm to the Texas risk reduction standard of 10 ppm for industrial settings (30 TEX. ADMIN. CODE § 335.568); the Louisiana risk evaluation standard of 11 ppm for industrial settings (Louisiana Dept. of Environmental Quality, Corrective Action Group, *Risk Evaluation Program* (Dec. 20, 1998) <www.deq.state.la.us/olae/irdd/recapdoc.htm>); the Massachusetts risk base standard of 2 ppm of PCBs in soil regardless of human exposure potential (MASS. REGS. CODE 310 §§ 40.0975, 40.0985); the New York standard of 1.0 ppm (surface) and 10 ppm (subsurface) (Memorandum from Michael O'Toole, Director, Div. of Hazardous Waste Remediation to Regional Haz. Waste Remediation Engineers, *et al.*, "Technical and Administrative Guidance Memorandum," (January 24, 1994)); and the Washington soil cleanup standards for industrial properties of 10.0mg/kg (WASH. ADMIN. CODE § 173-340-745).

tion calls for prompt judicial resolution to avoid needless delays in the implementation of an important national program. Both Congressional and the public interest in prompt PCB cleanup and disposal will be greatly frustrated if these preemption issues must be resolved on a piecemeal basis.

* * * *

Supreme Court, U.S.
FILED
MAY 2 2001

(2)

No. 00-1242

In the Supreme Court of the United States

UTILITY SOLID WASTE ACTIVITIES GROUP, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1999

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), in declining to decide the extent to which the Environmental Protection Agency's regulation of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*, preempts state laws governing the disposal of PCBs.

2. Whether the court of appeals correctly determined that EPA was not required to show substantial evidence in the record in order to retain statutory restrictions on the use and disposal of PCBs.

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In the Supreme Court of the United States

No. 00-1242

UTILITY SOLID WASTE ACTIVITIES GROUP, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 220 F.3d 683.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2000. Petitions for rehearing were denied on November 2, 2000 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Utility Solid Waste Activities Group (USWAG), General Electric Company (GE), and others, sought review of a final rule of the Environmental Protection Agency (EPA), under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, respecting the disposal of polychlorinated biphenyls (PCBs). The court of appeals, which has jurisdiction to review that rule, 15 U.S.C. 2618(a)(1)(A), rejected most of petitioners' challenges and remanded the rule to EPA for further proceedings.

1. TSCA directs EPA to regulate the manufacture, processing, distribution, use, and disposal of chemical substances and mixtures. See 15 U.S.C. 2605. TSCA specifically addresses, among other things, the class of chemicals known as PCBs. For many years, PCBs were commonly used in electrical equipment because they are excellent insulators and do not readily ignite. PCBs, however, are highly likely to pose a risk of cancer and other adverse effects to humans. Congress accordingly prohibited, through Section 6(e)(2)(A) of TSCA, the manufacture and use of PCBs "in any manner other than in a totally enclosed manner." 15 U.S.C. 2605(e)(2)(A). Congress further provided, however, that EPA may issue regulations authorizing use of PCBs in a manner other than a totally enclosed manner if EPA finds that such use "will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B). See Pet. App. 2a-3a.

2. This case arises from EPA's promulgation of a comprehensive, amended rule regulating disposal of PCBs. 63 Fed. Reg. 35,384 (1998) (the Disposal Rule). In 1991, EPA sought public comment on revising the PCB regulatory regime. 56 Fed. Reg. 26,738. Three

years later, EPA proposed regulations to allow many uses and disposal methods that previously had been prohibited. 59 Fed. Reg. 62,788 (1994). EPA ultimately adopted many changes that petitioners proposed in their comments, but the agency declined to authorize storage of PCBs for reuse, to amend certain PCB transformer regulations, or to allow decontamination of PCB-contaminated buildings and surfaces to the extent advocated by petitioners. EPA concluded that it could not make a finding of no "unreasonable risk," as would be necessary to support departing from Congress's ban with respect to those activities. See TSCA § 6(e)(2)(B) (15 U.S.C. 2605(e)(2)(B)); 63 Fed. Reg. at 35,399-35,400 (discussing storage for reuse); *id.* at 35,389 (discussing small transformers); *id.* at 35,398, 35,418 (discussing porous surfaces).

During the rulemaking, some commenters also urged EPA to announce an interpretation of Section 18 of TSCA, 15 U.S.C. 2617, that would embody a blanket preemption of state and local PCB disposal regulations. EPA declined to do so, explaining that the text of Section 18 preserves the authority of the States and their subdivisions to regulate chemical substances, 15 U.S.C. 2617(a)(1), except in carefully circumscribed circumstances, 15 U.S.C. 2617(a)(2)(A). EPA observed that "TSCA does not allow [EPA] to preempt State disposal rules which describe the manner or method of disposal of a chemical substance or mixture." 63 Fed. Reg. at 35,386. See, *e.g.*, 15 U.S.C. 2617(a)(2)(B) (providing that an EPA rule imposing a requirement described in 15 U.S.C. 2605(a)(6), which addresses the "manner or method of disposal" of chemical substances, does not have preemptive effect). See also 59 Fed. Reg. at 62,832 ("State PCB disposal rules are not preempted because they describe the manner or method of disposal

of PCBs."). EPA also noted other limitations, set out in 15 U.S.C. 2617(a)(2)(B) and 2617(b), on preemption of state and local laws. See 59 Fed. Reg. at 62,832. EPA observed that it was taking no regulatory action respecting blanket preemption and that it considered the matter outside the scope of the rulemaking. 63 Fed. Reg. at 35,386.

3. USWAG challenged portions of the Disposal Rule concerning storage for reuse and PCB transformers as well as EPA's view that TSCA does not preempt all state and local disposal regulations. GE challenged, among other matters, EPA's decision concerning decontamination and use of buildings and surfaces. The court of appeals rejected petitioners' arguments respecting those matters, as well as other challenges to EPA's rule. Pet. App. 1a-35a.

The court of appeals concluded that USWAG's arguments respecting preemption do not present an issue that is ripe for review. Pet. App. 8a-12a. It applied this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), which requires an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. See Pet. App. 10a-11a. The court of appeals rejected USWAG's contention that its challenge necessarily is ripe for consideration because it "involves a pure question of law." *Id.* at 11a. The court observed:

> In this case, USWAG has identified no State or local regulations that it contends TSCA should preempt. Nor has USWAG offered evidence that it will suffer hardship if we defer consideration of this issue. Based on this record, we conclude that any hardship

> that USWAG could suffer is conjectural and thus, the issue is not ripe for review.

Id. at 11a-12a.

The court of appeals also rejected petitioners' challenges to the portions of the rule respecting storage for reuse, PCB transformers, and contaminated buildings and surfaces. The court acknowledged at the outset that the Administrative Procedure Act's (APA's) scope-of-review provision, 5 U.S.C. 706, applies to review of TSCA regulations, "except that 'the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole.'" Pet. App. 5a (quoting 15 U.S.C. 2618(c)(1)(B)(i)) (emphasis added by the court). But the court concluded that, in light of Congress's categorical ban on most uses of PCBs and Congress's direction that EPA may provide regulatory exceptions to that statutory ban, TSCA reflects Congress's intent that courts apply the substantial evidence standard "only to those EPA decisions *permitting* the use of PCBs." *Id.* at 6a. "Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like." *Id.* at 7a. The court of appeals accordingly employed the APA's "arbitrary and capricious" standard in evaluating EPA's decisions respecting storage for reuse, *id.* at 12a-14a, PCB transformers, *id.* at 16a-20a, and contaminated buildings and surfaces, *id.* at 22a-26a.

ARGUMENT

The court of appeals correctly followed *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and applied familiar principles of administrative law to the facts of

this case. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals and presents no issue warranting this Court's review.

1. Petitioners contend that this Court should resolve a supposed conflict among the courts of appeals over whether the "hardship" prong of the *Abbott Laboratories* ripeness test applies when the issue to be reviewed is purely legal and the time for review of regulations is limited by statute. Pet. 10. Petitioners base that argument on a misunderstanding of *Abbott Laboratories*. Furthermore, the conflict that petitioners assert does not exist.

The Court's decision in *Abbott Laboratories* reflects the principle, arising from Article III and prudential considerations, that an administrative decision is not ripe for judicial review until the "decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-149. Under *Abbott Laboratories*, the ripeness inquiry turns on a pragmatic assessment of *both* the institutional interests of the agency and the courts in avoiding premature or advisory adjudication, *and* the interests of the regulated parties in obtaining a timely resolution of the issue in dispute. This Court accordingly has directed lower courts "to evaluate *both* the fitness of the issues for judicial decision *and* the hardship to the parties of withholding court consideration." *Id.* at 149 (emphasis added). Both factors are relevant to determining whether the dispute presents a ripe judicial controversy.

The court of appeals correctly recognized that petitioners' preemption claim is not ripe under the *Abbott Laboratories* test. Petitioners "identified no State or local regulations that [they] conten[d] TSCA should

preempt." Pet. App. 11a. Hence, the courts and EPA have an institutional interest in avoiding premature adjudication of an entirely speculative issue. *Id.* at 11a-12a. Petitioners also failed to convince the court of appeals that they would suffer hardship if the court deferred consideration of the preemption issue until a State attempted to enforce a potentially conflicting law. *Ibid.* Consequently, petitioners have no substantial countervailing interest in adjudication of the preemption issue at this time. Indeed, judicial review of the preemption issue in this proceeding would be essentially advisory in light of the fact that any state and local authorities whose laws might be affected are not parties to this proceeding and would not be bound, under principles of res judicata, by any purported adjudication of preemption in this case.

Petitioners' suggestion that the court of appeals should have dispensed with the "hardship prong" in this case is without merit. See Pet. 14-16. This Court applies both prongs of the *Abbott Laboratories* test in cases that involve "purely" legal issues where Congress has set time limits for review of agency regulations. See *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 915 (2001). *American Trucking Associations* confirms that "hardship" can be a relevant consideration, regardless of the nature of the question presented and the statutory review scheme, in determining whether there is a genuine judicial controversy. See *id.* at 916 (evaluating "hardship" even though the case involved a legal issue arising in the course of preenforcement review). The court of appeals properly concluded, "[b]ased on this record," that the speculative nature of the preemption issue in this proceeding, coupled with the absence of hardship to the complaining parties, made that particular issue unripe for review. Pet. App.

11a-12a. The proffered hardship was purely "conjectural" and not remotely like the more concrete harm demonstrated in *American Trucking Associations*. *Ibid.*[1]

Petitioners are mistaken in suggesting that the court of appeals' decision conflicts with decisions of other courts of appeals. See Pet. 11-12. The decisions that petitioners cite simply reflect that the ripeness inquiry turns on an assessment of the facts and interests in each individual case.

For example, the District of Columbia Circuit ruled in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905, 915-919 (1985), that a particular issue under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, was ripe for review. The court did not hold, as petitioners suggest here, that hardship is irrelevant whenever "the issues are predominantly legal, and the

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[1] In *American Trucking Associations*, "[t]he respondent States [were required]—on pain of forfeiting to the EPA control over implementation of [National Ambient Air Quality Standards]—promptly [to] undertake the lengthy and expensive task of developing state implementation plans (SIP's) that w[ould] attain [a] new, more stringent standard within five years." 121 S. Ct. at 916. Here, by contrast, USWAG neither "identified * * * State or local regulations that it contend[ed] TSCA should preempt," nor "offered evidence that it will suffer hardship" from "defer[red] consideration." Pet. App. 11a-12a. Moreover, the decision USWAG seeks would not, in itself, invalidate state or local regulations. USWAG and its members would be required to demonstrate in any concrete case that the challenged state or local regulation did not qualify for any of the additional exceptions to preemption set out in TSCA Section 18(a)(2)(B)(i) through (iii), as opposed to the "parenthetical exception" in Section 18(a)(2)(B), on which USWAG founds its case. See 15 U.S.C. 2617(a)(2)(B)(i)-(iii) and 2617(b), discussed at pp. 10-11, *infra*. See also pp. 3-4, *supra*.

time for judicial review is circumscribed by statute." Pet. 11. Rather, the court concluded that, because the specific matter at issue amply satisfied the fitness for review prong of the *Abbott Laboratories* test, the court did not need to reach the question of hardship to the complaining parties. See 759 F.2d at 918 ("Where the [judicial fitness] prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review, assuming that constitutional case or controversy requirements have been met, no purpose is served by proceeding to the [hardship] prong.").

The District of Columbia Circuit reaffirmed in *Eagle-Picher* that, as a general matter, when "either the agency or the court has a significant interest in postponing review, [it] w[ould] decline to hear the petitioner's claim * * * unless, under the hardship to the parties prong, the interest of those who seek relief from the challenged action's immediate and practical impact upon them outweighs the competing institutional interests in deferring review." 759 F.2d at 915 (internal quotation marks and footnotes omitted). But the court determined in *Eagle-Picher* that EPA and the courts "had a *positive interest* in review during the statutory [review] period." *Id.* at 918. In this case, by contrast, the courts and EPA have a significant interest in postponing review. Petitioners seek adjudication of whether EPA's rule preempts state and local police powers, even though no particular state or local regulation is presently at issue. Neither the courts nor EPA have a "positive interest" in immediate adjudication of that abstract question and, under the *Eagle-Picher* rationale, the matter is not ripe for judicial review.

The other cases of the District of Columbia Circuit on which petitioners rely also do not support their assertion of a conflict. For example, in *Natural Re-*

sources Defense Council, Inc. v. *EPA*, 859 F.2d 156 (D.C. Cir. 1988), the court confronted a host of challenges to EPA's regulations under the Clean Water Act, which contains a similarly limited judicial review provision. *Id.* at 167. The court in that case affirmed the principle that, "where there are institutional benefits for court or agency in deferring review, we must consider the hardship to the challenging parties from delay, and proceed to the merits only when the latter outweighs the former." *Ibid.* The court dismissed as unripe petitioners' claim that EPA lacked statutory authority to impose "antibacksliding" permit rules, where the agency forswore "any intention" to act, "[t]he institutional interests in avoiding the waste of judicial resources on speculative claims clearly militate[d] against" review, and "[n]o hardship [wa]s asserted." *Id.* at 196. Similarly, in *Florida Power & Light Co.* v. *EPA*, 145 F.3d 1414 (D.C. Cir. 1998), the petitioner sought judicial review of EPA preamble statements of a legal nature. The court found the case unripe, citing, among other things, the petitioner's inability to demonstrate hardship under *Abbott Laboratories*. *Id.* at 1421.

The court of appeals in this case rightly rejected petitioners' assertions respecting the benefits of immediate review. See Pet. 16 n.9. USWAG staked its preemption claim on its interpretation of the "parenthetical exception" to preemption in Section 18(a)(2)(B) of TSCA. See Pet. 4. But other provisions of Section 18(a)(2)(B) set out additional exceptions, any of which could apply to a given state or local PCB regulation. See 15 U.S.C. 2617(a)(2)(B)(i)-(iii) and 2617(b) (exceptions applying to state regulations identical to EPA's, adopted under the authority of other federal laws, or prohibiting certain uses of a substance or mixture in a

State, and to regulations granted an exception by EPA). Thus, even if the court of appeals had reviewed USWAG's preemption claim and accepted USWAG's view of the "parenthetical exception," the court's ruling would not have eliminated the future need to evaluate state and local regulations for preemption on a case-by-case basis. See Pet. 16 n.9 (incorrectly suggesting that immediate judicial review would avoid future litigation). Immediate review therefore would not eliminate the hardship petitioners assert.[2]

2. Petitioners additionally contend that the court of appeals erred in applying TSCA's substantial evidence test. Pet. 17-23. The court of appeals' interpretation of Section 19(c)(1)(B)(i) is correct and does not conflict with the decisions of other courts of appeals.

There is no dispute that TSCA requires EPA to rely on substantial evidence when creating exceptions to TSCA's statutory restrictions on PCB use. See Pet. App. 6a-7a. Petitioners, however, contend that EPA must also come forward with substantial evidence when EPA determines that the evidence is insufficient to create an exception. Petitioners overlook what the court of appeals recognized: Congress imposed statutory restrictions on PCB use based on its legislative judgment that PCBs pose an unreasonable risk of injury; although Congress gave EPA authority to make exceptions to the restrictions if the exceptions are supported by "substantial evidence," Congress did not

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[2] Contrary to petitioners' suggestion (Pet. 16), TSCA's deadline for judicial review would not foreclose all later review of this issue. State or local laws or regulations regarding disposal of PCBs will be subject to timely challenge. In such cases, the parties with the greatest stake in the outcome will have an opportunity to argue for or against the validity of the particular law or regulation at issue.

authorize EPA or the courts to override the statutory restrictions whenever the record in a particular proceeding lacks substantial evidence confirming Congress's legislative determination that the restrictions are appropriate as a general rule. As the court of appeals explained:

> Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like. Petitioner[s] may nevertheless challenge such a decision, or indecision as the case may be, but they must do so as most petitioners do in most informal rulemakings, by showing that the agency acted arbitrarily and capriciously.

Pet. App. 7a.

The court of appeals' reasoning is sound. Section 6(e)(2)(A) of TSCA provides that, after January 1, 1978, "no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner." 15 U.S.C. 2605(e)(2)(A). Section 6(e)(2)(B) then allows EPA to authorize uses in other than a totally enclosed manner, but only if it "finds that such * * * use * * * will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B). Against that statutory backdrop, Section 19(c)(1)(B)(i) of TSCA provides that, "in the case of review of a rule under [Section 6(e)]," "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record." 15 U.S.C. 2618(c)(1)(B)(i). Given that Congress itself determined to ban PCB use, it would be unreasonable to conclude that Congress authorized a

court to overturn the statutory ban if EPA did not marshal substantial evidence in a particular rulemaking for supporting the ban. Indeed, Congress made clear that EPA may relax the ban only if it finds that there is *no* "unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(e)(2)(B).

The court of appeals correctly concluded that Section 19(c)(1)(B)(i) should be read in conjunction with Congress's judgment that, in order to protect the public from PCB exposure, the statutory ban should remain in force unless EPA determines that substantial evidence supports an exception. Cf. *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences."). "To require a greater evidentiary showing by EPA," the court of appeals noted, "would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes." Pet. App. 7a.

None of the TSCA decisions upon which petitioners rely endorses petitioners' novel argument. Rather, each decision arose from a case in which EPA authorized a departure from the congressional ban, or addressed an issue arising under a provision of TSCA other than Section 6(e). Although the courts in those cases correctly applied the substantial evidence standard to the rules before them, their reasoning does not reach the question presented here and therefore cannot create a conflict with the court of appeals' decision in this case.

In *Environmental Defense Fund, Inc. (EDF)* v. *EPA*, 636 F.2d 1267 (1980), the District of Columbia Circuit, like the court of appeals here, adopted the view that TSCA creates a rebuttable presumption against use of PCBs. See *id.* at 1275 n.17. Thus, the *EDF*

court's decision that substantial evidence is required to support an authorization of use (*i.e.*, to overcome the presumption) does not conflict with the court of appeals' decision here. *Id.* at 1277; see Pet. App. 7a (discussing *EDF*). The other TSCA cases petitioners cite do not address EPA's adherence to or departures from Section 6(e)'s ban. They instead involve rulemakings under other sections of TSCA, in which Congress's ban of PCBs played no part.[3]

Petitioners also claim that decisions construing other "substantial evidence" statutes "have uniformly abided by the statutory language and applied the substantial evidence test." Pet. 20. But petitioners make no attempt to account for whether the cited statutes contain statutory language similar to TSCA's ban on PCB use. Indeed, none of them do.[4] Thus, those decisions do

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[3] See *Chemical Mfrs. Ass'n* v. *EPA*, 859 F.2d 977 (D.C. Cir. 1988) (review of testing rule for 2-ethylhexanoic acid under Section 4 of TSCA, 15 U.S.C. 2603); *Ausimont U.S.A. Inc.* v. *EPA*, 838 F.2d 93 (3d Cir. 1988) (review of testing rule for fluoroalkenes under Section 4); *Shell Chem. Co.* v. *EPA*, 826 F.2d 295 (5th Cir. 1987) (review of testing rule for mesityl oxide under Section 4 of TSCA). Petitioners rely on a number of cases that do not involve TSCA at all. See Pet. 18 n.11. Those decisions, which simply note the searching nature of the substantial evidence test, Pet. 18-19, are inapposite to the question of whether the substantial evidence test applies to the particular regulatory decisions that petitioners challenge.

[4] See 15 U.S.C. 57a(e)(3)(A) (review of Federal Trade Commission's affirmative identification of unfair or deceptive commercial acts or practices); 15 U.S.C. 1193(e)(3) (review of Consumer Product Safety Commission's affirmative determinations of product flammability standards); 15 U.S.C. 2060(c) (review of Consumer Product Safety Commission's affirmative determinations of consumer product safety standards); 29 U.S.C. 655(f) (review of Occupational Safety and Health Administration's affirmative adoption of occupational safety and health standards).

not aid resolution of the particular issue presented in this case.

Finally, petitioners are wrong in suggesting that the court of appeals' construction would create a "strange and unworkable framework for judicial review of TSCA PCB rules." Pet. 22. The court of appeals has adopted a straightforward and sensible approach. If EPA elects to make an exception to Congress's ban on PCB use, its decision must be based on substantial evidence. If EPA declines to make an exception, its decision is reviewed under the arbitrary or capricious standard. It is petitioners' construction that would create a "strange and unworkable framework." Under their reading of TSCA, any party petitioning EPA to relax the ban could force a departure from Congress's presumption despite EPA's non-arbitrary determination to the contrary, merely because the vagaries of a given rulemaking did not yield substantial record evidence supporting Congress's judgment. That counter-intuitive construction would defeat Congress's clear mandate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-1242

IN THE
Supreme Court of the United States

THE UTILITY SOLID WASTE ACTIVITIES GROUP, ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AMERICAN ELECTRIC POWER SERVICE CORPORATION, AND GENERAL ELECTRIC COMPANY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI

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The court of appeals' decision presents two questions that warrant this Court's review: (1) whether a court must consider hardship to the parties when deciding whether a case is ripe for review where the issue presented is purely legal and Congress has prescribed a limited period for judicial review; and (2) whether a court may ignore an express statutory standard of review and apply a more deferential standard based on the court's interpretation of the context of a petition for review of an agency rule.

With respect to the first question, the decision in *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903 (2001), handed down after the petition for certiorari was filed, suggests that a

suit may be ripe for review without a showing of hardship when the petition challenges regulations issued under a statute that specifies a limited period for judicial review. Contrary to the Environmental Protection Agency's argument, a clear split exists between the courts of appeals on this precise question. Because of the prevalence of statutes that specify limited review periods, this question will arise repeatedly. With respect to the second question, Respondent divines "congressional intent" supporting the dual standard of review propounded by the court of appeals, even though that formulation is directly contrary to the plain language of the statutory judicial review provision, and no legislative history suggests that Congress meant anything other than what it said in the statute. The decision below is at odds with that of every other court of appeals which has applied the provision.

I. THE COURT'S DECISION IN *AMERICAN TRUCKING* LEAVES OPEN THE APPLICABILITY OF THE "HARDSHIP PRONG" OF THE *ABBOTT LABORATORIES* RIPENESS TEST WHERE THE TIME FOR REVIEW OF REGULATIONS IS LIMITED BY STATUTE.

According to Respondent, *American Trucking* confirms that "hardship" can be a relevant ripeness consideration where Congress has set time limits for review of agency regulations. Opp. 7-8. In *American Trucking*, however, this Court had before it a record that indicated some hardship to the parties from deferring review. The decision therefore did not decide the question whether a challenge to a regulation under a statute providing a limited period for judicial review may be ripe despite a court's conclusion that hardship has not been demonstrated.

American Trucking cites the proposition that statutes providing for preenforcement review permit immediate judicial consideration without the need to show that petitioner has felt the "'concrete effects'" of the regulatory enactment. *American Trucking*, 121 S. Ct. at 916 (quoting *Lujan* v. *National*

Wildlife Fed'n, 497 U.S. 871, 891 (1990)). But the Court does not explain what showing of hardship, if any, is required in cases involving such statutes. Although the precise formulation of the ripeness standard is left unclarified, at a minimum the Court employs a "lower standard" than applied by the Fifth Circuit below. *Id.* This case affords the Court a perfect opportunity to decide whether congressional specification of a limited period for preenforcement review permits a court to dispense entirely with the consideration of hardship when assessing ripeness.

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON WHETHER RIPENESS REQUIRES HARDSHIP TO THE PARTIES WHERE THERE IS A LIMITED STATUTORY PERIOD FOR JUDICIAL REVIEW.

Respondent mischaracterizes the District of Columbia Circuit's decision in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985) and subsequent cases. Opp. 8-11. Respondent's brief dwells on the "fitness for review" prong of *Abbott Laboratories* without acknowledging *Eagle-Picher*'s central holding: where the first prong of *Abbott Laboratories* is satisfied no hardship need be shown so long as the petition involves an issue that is purely legal and is a challenge to a regulation promulgated pursuant to a statute that sets a limited period for judicial review. See *Eagle-Picher*, 759 F.2d at 918.

While Respondent seeks to downplay this holding, in fact, *Eagle-Picher* is the landmark decision in which the District of Columbia Circuit altered the ripeness analysis in cases involving statutes in which Congress has expressed a strong preference for immediate judicial review. In *Eagle-Picher*, the "fitness" prong was satisfied by a finding that the issue presented for review was "a purely legal question and thus was 'fit' in that respect for judicial resolution during the

statutory period." *Id.* at 916.[1] The court concluded that when "the first prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review," the hardship prong need not be considered. *Id.* at 918.[2]

Respondent conflates the two prongs of *Abbott Laboratories* in attempting to show that the District of Columbia Circuit jurisprudence is something it is not.[3] In the District of Columbia Circuit it is settled that where "a petitioner 'raises a purely legal question,'" the court will "assume that issue is suitable for judicial review." *Mississippi Valley Gas Co.* v. *FERC*, 68 F. 3d 503, 508 (D.C. Cir. 1995) (quoting *Eagle-*

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[1] Although Respondent dismisses the benefits of immediate review, Opp. 10-11, there is a positive interest in immediately resolving whether the Mega Rule's repudiation of federal preemption squares with the preemption provision of 15 U.S.C. § 2617 ("TSCA § 18"). Notwithstanding that there may be questions about the extent of exceptions to the provision, preemption is predominantly, if not purely, a legal question. *See Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Petitioners seek adjudication of EPA's affirmative regulatory interpretation that TSCA does not preempt state and local PCB disposal rules, a legal conclusion that will immediately affect how states and localities implement PCB regulations, regardless of how particular exceptions may later be construed.

[2] *Eagle-Picher* also implicitly acknowledges that the Article III "case or controversy" requirement may be satisfied even where no hardship to the parties is shown. *See Eagle-Picher*, 759 F.2d at 915, 918.

[3] Respondent's focus on the first prong of the *Abbott Laboratories* test – fitness for review – is also largely irrelevant because the court of appeals below did not specifically address whether that prong was satisfied in this case. Instead, that court restated the law in the Fifth Circuit that requires a showing of hardship and determined only that Petitioners had demonstrated none. Pet. App. 11a. Moreover, despite Respondent's contention that no showing of hardship was made in the court below, Opp. 8 n.1, the court of appeals did in fact have before it Petitioners' concerns of delayed PCB cleanups and protracted state-by-state litigation if the preemption issue was not promptly resolved, as well as examples of state regulations that Petitioners contend TSCA preempts and that could potentially be applicable to Petitioners. Pet. 7 n.4.

Picher, 759 F.2d at 915). That court will accordingly reject an agency's suggestion that a "petition must be dismissed absent a showing of 'hardship.'" *Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 540-41 (D.C. Cir. 1999).[4] This conflicts squarely with the Fifth Circuit's approach, which requires consideration of hardship regardless of other circumstances. Pet. App. 11a ("This Court has held, however, that even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.")

EPA's analysis involves nothing more than wishing this conflict away. What is absolutely clear is that Petitioners' preemption issue would have been decided on the merits in the District of Columbia Circuit; it was not resolved by the Fifth Circuit; and there is at least a risk that the issue never will be reviewed unless this Court grants the petition.

The significant number of statutes (Pet. 10-11; Pet. App. 47a-59a) that provide for preenforcement review of regulations guarantees continuation of the conflict between these circuits' application of *Abbott Laboratories* until this Court clarifies the relationship between hardship and ripeness in petitions for preenforcement review. This case is the right vehicle to resolve this core procedural issue of administrative review.

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[4] The District of Columbia Circuit has taken this approach to hardship in many other cases decided since *Eagle-Picher*. *See, e.g.*, *Louisiana Envtl. Action Network* v. *EPA*, 172 F.3d 65, 69 (D.C. Cir. 1999); *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 621-22 (D.C. Cir. 1998); *Natural Res. Def. Council, Inc.* v. *EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994); *National Recycling Coalition, Inc.* v. *Reilly*, 884 F.2d 1431, 1434 (D.C. Cir. 1989).

III. CONTRARY TO EVERY OTHER COURT OF APPEALS THAT HAS CONSIDERED REGULATIONS ISSUED UNDER TSCA, THE COURT BELOW IGNORED THE PLAIN LANGUAGE OF THE TSCA JUDICIAL REVIEW PROVISION.

The court of appeals' convoluted justification (which Respondent does no more than parrot) for applying arbitrary and capricious review rather than the substantial evidence standard that Congress expressly specified has no basis in TSCA's text or legislative history. Pet. 21-22; Opp. 11-15. TSCA § 19(c)(1)(B)(i) provides, in full:

> Section 706 of Title 5 shall apply to review of a rule under this section, except that – (i) in the case of review of a rule under section 2603(a), 2604(b)(4), 2605(a), or 2605(e) of this title, the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3) of this section) taken as a whole ....

15 U.S.C. § 2618(c)(1)(B)(i). Except for the decision below, *every* court of appeals that has reviewed a regulation issued under any one of the *four* subsections enumerated in this judicial review provision has followed the plain language and applied a substantial evidence standard. Pet. 17-18.

Respondent attempts to dismiss the inconsistency among the circuits presented in the Petition by asserting that most of the cases cited by Petitioners do not concern PCB regulations. Opp. 14 & n.3. While true, all such cases concern TSCA § 19(c)(1)(B)(i), the provision in dispute here. Since that section contains no exceptions for PCB versus other covered regulations, all decisions construing that section are properly considered in defining a decisional conflict that warrants resolution by this Court.

Among the subsections identified in § 19(c)(1)(B)(i) is TSCA § 6(e), which authorizes EPA regulation of PCBs. 15 U.S.C. § 2605(e). The court of appeals below held that the substantial evidence standard applies only to a challenge to an EPA decision to permit the use or expand the use of PCBs, while the arbitrary and capricious standard applies to EPA rules restricting or prohibiting the use of PCBs. Pet. App. 8a.

The judicial review provision in TSCA § 19(c)(1)(B)(i) is comprehensive, sweeping in several different EPA regulatory powers. Some of these authorizations involve creating exceptions to general prohibitions. See 15 U.S.C. § 2605(e)(2)(B), (e)(3)(B) ("TSCA § 6(e)(2)(B), (e)(3)(B)"). Others involve regulation without a set baseline. See, *e.g.*, 15 U.S.C. §§ 2604(b)(4)(A), 2605(a), (e)(1) ("TSCA §§ 5(b)(4)(A), 6(a), (e)(1)"). Nothing in the judicial review provision distinguishes or subdivides these disparate provisions to supply a standard of review other than substantial evidence. Instead, the section expressly precludes the arbitrary and capricious standard otherwise applicable under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Moreover, TSCA § 6(e)(2) delegates to EPA the power to do only one thing: "authorize the ... use ... of any polychlorinated biphenyls in a manner other than in a totally enclosed manner if the Administrator finds that such ... use ... will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2). EPA relied on this section in promulgating the regulations challenged in this case. See 63 Fed. Reg. 35,384, 35,385 (June 29, 1998). All of the regulations challenged in this case authorize, to some degree, use of PCBs other than in a totally enclosed manner. Nothing in § 6(e) modifies the plain language of the judicial review provision to suggest that the degree of departure from the prohibition should govern the standard of review.[5]

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[5] Respondent's characterization of EPA's decisionmaking here – *i.e.* that EPA rejected industry requests to create or enlarge exceptions to the

The impracticability of applying the dual standard Respondent urges is illustrated by one of the regulations at issue in the Mega Rule petitions. In 1982, EPA authorized storage of PCBs for reuse upon a finding that such use would not present an unreasonable risk of injury to health or the environment. The Mega Rule tightened some of the conditions of storage for reuse but continued to authorize the practice. Pet. App. 13a-14a. The challenged regulations, which continue to permit this use, do not fit either of the review scenarios the court of appeals envisioned. Opp. 15. They are neither a newly-adopted exception to the PCB ban, since storage for reuse has been permitted for nearly 20 years, nor an EPA decision to decline to make an exception to the ban. Should the standard of review of these new rules depend on whether a challenge contends that these new conditions on storage are too tight or too loose? Or on the identity of the petitioner? We submit that § 19(c)(1)(B)(i)'s simple directive that EPA must justify whatever rule it issues under § 6(e) by a showing of substantial evidence is the only workable test for assessing the validity of the rule under TSCA's judicial review provision – regardless of whether the rule authorizes or restricts the use of PCBs.

We can find no other case, and the court below and Respondent cite none, where a court has applied a bifurcated standard of review to an agency rule depending on the nature of the rule being challenged and the perceived interest of the petitioner. There is simply no justification for intuiting such a "congressional intent" when the statutory text and legislative history are both clear and to the contrary.

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ban on PCB's – is nothing more than a straw man. Opp. 11-13. The petitions for review below were *not* challenges to the denial of rulemaking petitions; instead, they were plain challenges to the text of the final rule under the substantial evidence standard.

CONCLUSION

For the reasons set forth in the petition and herein, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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